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No. 90-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOUIS P. BERGNA,

Petitioner,

v.

JULIUS L. FINKELSTEIN,

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a claim against a public official for damages for deprivation of property and liberty without due process brought by a public figure plaintiff, to which a defense of qualified immunity has been asserted, may a court deny the qualified immunity without considering the particular factual and legal context in which the claim arose, including the facts that the deprivation was a temporary suspension of employment, that a prompt and fair post-deprivation hearing was provided, that the plaintiff was a candidate for public office as well as a public employee, that state and local law apparently permitted the conduct at issue, and that no directly applicable federal case law existed?

LIST OF ALL PARTIES

The following are all parties to the proceeding in the Court of Appeals:

Julius L. Finkelstein, Plaintiff-Appellant (Respondent here)

Louis P. Bergna, Defendant-Appellant (Petitioner here)

County of Santa Clara, California, Defendant below

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No. 90-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

LOUIS P. BERGNA,

Petitioner,

v.

JULIUS L. FINKELSTEIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Louis P. Bergna, prays that the Court issue a Writ of Certiorari to review the judgment of the United

States Court of Appeals for the Ninth Circuit entered January 29, 1991.

DECISIONS BELOW

The Opinion and Order of the Court of Appeals for the Ninth Circuit filed January 29, 1991 is reported at 924 F.2d 1449 and is set forth in the Appendix at 1a-22a. That Opinion replaced and withdrew an earlier Opinion of the Court of Appeals reported at 881 F.2d 702 (9th Cir. 1989). The Order of the District Court for the Northern District of California denying Petitioner's motion for summary judgment is unreported and is set forth in the Appendix at 23a-47a.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked to review the Judgment entered by the Court of Appeals for the Ninth Circuit on

its Order and Opinion filed January 29, 1991 (App. 1a-22a). On April 12, 1991, Justice O'Connor extended the time within which Petitioner may file this Petition for Writ of Certiorari to and including May 29, 1991.

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution

Section 1. Due Process of Law

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Santa Clara County Code

Sec. A25-302. Determining degree of seriousness of offense.

(a) In determining the degree of seriousness of an offense which is a cause of suspension, demotion or dismissal, the appointing authority shall consider:

(1) The nature and extent of the specific act in terms of its effect upon the functions of the department.

(2) Damage to public interest or welfare.

(3) Whether a reasonable period has elapsed since a prior offense.

(b) The decision to suspend, demote or dismiss depends on the seriousness of the offense. A suspension of not more than thirty (30) days may be set by the appointing authority. (Code 1954, § 3.3.12-3; Ord. No. NS-304.20, § 1, 7-23-62)

Sec. A25-303. Procedure for dismissal, demotion or suspension for cause.

(a) Disciplinary actions may be taken without prior notice where, in the opinion of the appointing authority, the action of the employee makes such action necessary. . . .

STATEMENT OF THE CASE

Proceedings Below

Respondent Julius L. Finkelstein commenced this action nearly eight years ago, on October 24, 1983. Respondent alleged that his temporary suspension from the position of Deputy District Attorney by the then-District Attorney of Santa Clara County, Petitioner Louis P.

Bergna, violated Respondent's rights under various constitutional and statutory provisions. Of pertinence here, Respondent alleged that his temporary suspension and Bergna's announcement of that suspension at a press conference on October 25, 1982, constituted a deprivation of his property rights in his public employment and his liberty interest in his occupation, in violation of the Due Process Clause.

Bergna, as a public official, asserted a qualified immunity defense to Respondent's due process claims. On October 14, 1987, the District Court denied Bergna's motion for summary judgment on qualified immunity grounds

(App. 23a-34a).[1] Bergna appealed to the Court of Appeals for the Ninth Circuit, invoking that Court's jurisdiction under 28 U.S.C. § 1291 and Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985).

On Bergna's appeal from that denial, the Court of Appeals for the Ninth Circuit affirmed in a panel opinion filed August 2, 1989 (881 F.2d 702). Respondent filed a timely petition for rehearing with suggestion for rehearing en banc. More than one year later, on January 29, 1991, the same panel of the Court of Appeals granted the petition for rehearing (App. 4a), withdrew the prior opinion (App. 4a), dismissed the en banc suggestion as moot, and issued a

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[1]Earlier, in an Order entered June 23, 1986 (App. 48a-94a), the District Court had denied the same motion without prejudice to its renewal upon a showing as to the "clearly established law" (App. 67a, 69a). The October 14, 1987 Order resulted from the renewal of that motion.

superceding Opinion and Order (924 F.2d 1449, App. 5a-22a).

In its final Opinion and Order, the Court of Appeals upheld the District Court's denial of summary judgment on qualified immunity grounds as to the due process property and liberty interest claims.[2] The Court of Appeals rejected what it characterized as Bergna's two main contentions: "that it was not clearly established in 1982 that a temporary suspension, as opposed to a discharge, could implicate the procedural

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[2]The Court of Appeals' Order and Opinion reversed the prior panel opinion and the District Court on the other qualified immunity issue presented by the appeal: whether Bergna enjoyed a qualified immunity from Respondent's suit on his First Amendment claim based on allegations that Bergna's suspension of Respondent and public announcement of the suspension impermissibly interfered with Respondent's exercise of his First Amendment rights as a candidate for public office. The Ninth Circuit also held that a federal qualified immunity is not applicable to pendent state law claims. Those issues are not raised on this Petition for Writ of Certiorari.

protections of the due process clause," and "that the post-deprivation process afforded Finkelstein was sufficient to meet the requirements of the due process clause" (App. 7a).[3]

Statement of Facts

The events which gave rise to this action occurred "during the hotly contested election in 1982 for District Attorney of Santa Clara County" (App. 37a). After 25 years of public service, Petitioner Bergna was retiring from the

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[3]Petitioner respectfully asserts that the Ninth Circuit mischaracterized his submissions on the two due process issues before it. His contentions were, more accurately stated, that: (1) it was not clearly established in 1982 that a public employee's temporary suspension without prior hearing violated procedural due process rights where the employer provided a prompt and fair post-deprivation hearing at which the employee could obtain complete make-whole relief; and (2) it was not clearly established in 1982 that a prompt and fair post-deprivation hearing failed to protect the due process liberty interest of a temporarily suspended public figure/public employee.

District Attorney position. Respondent Finkelstein was then a Deputy District Attorney and one of two candidates for election to the District Attorney position being vacated by Petitioner (App. 5a). Petitioner supported plaintiff's opponent, Leo Himmelsbach (App. 5a). The District Court has determined that, based upon his candidacy for office, Respondent was a public figure (App. 77a).

Shortly before the 1982 election, a local newspaper article disclosed that Bergna had reprimanded Himmelsbach in 1974 for Himmelsbach's handling of certain stolen property. Bergna had reason to believe that this information had been obtained from confidential personnel files in the District Attorney's office (App. 53a-54a). After the article appeared, Terri Briggs, a Deputy

District Attorney, approached Bergna. She told him about a conversation she had previously had with Lane Liroff, another Deputy District Attorney and a Finkelstein supporter in the 1982 election. The District Court summarized what Briggs told Bergna she had been told by Liroff and what she did thereafter with that information:

> [H]e and Finkelstein had stayed late after work and read the personnel files of various employees. In the course of the conversation, Liroff had mentioned that there were "inane" comments on several of the resume [sic], including Briggs' own. Briggs had reviewed her personnel file and had observed a comment similar to the one Liroff had reported. . . . [I]n light of the article that had appeared that day she felt she had to tell Bergna (App. 53a-54a).

This information appeared reliable to Bergna and he concluded that the newspaper article was based upon material

which had been taken and disclosed without authorization from personnel files in the District Attorney's Office and that the source of the unauthorized disclosure was Respondent and Lane Liroff (App. 53a-55a).

Since Respondent and Liroff were County employees subject to County personnel policy established pursuant to the County Charter, Bergna consulted Philip Batchelor, Assistant Santa Clara County Executive and former County Personnel Director, who was familiar with County personnel rules. Batchelor told Bergna that under County law and personnel rules (see provision quoted at pp.4-5 above) he had the power to suspend Respondent without pay for up to 30 days, and suggested that such a suspension pending further investigation was appropriate (App. 55a).

At Bergna's request the State Attorney General's Office undertook an investigation of the suspected unauthorized taking and disclosure of personnel files. For several days, Respondent avoided meeting with investigators from the Attorney General's office. Bergna believed Respondent's refusal to meet the investigators confirmed Respondent's involvement in the unauthorized taking and disclosure. Bergna therefore decided to implement Respondent's suspension pending further investigation, effective immediately, on October 25, 1982 (App. 55a-56a). The suspension was a matter of public record (Excerpts of Record 231 (Declaration of Patricia Fierro, August 17, 1987), pp.1-2; Excerpts of Record 227, Ex. J, p.2).

Because of the impending election, Bergna was concerned about how the press

and public would perceive Respondent's suspension, and about its potentially disruptive impact on the District Attorney's Office. After reviewing his reasons for wanting to call a press conference with Batchelor, Bergna held a press conference, at which he read a statement announcing Respondent's suspension and describing the information provided to him on which he had acted (App. 56a). The press conference and the suspension received public notice.

Respondent's suspension was subject to County personnel rules. Under those rules, Respondent had a right to a "Skelly hearing"[4] to review the suspension pending investigation. On the day of the suspension, October 25, 1982,

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[4]So named because it is designed to meet the due process requirement of Skelly v. State Personnel Bd., 15 Cal.3d 194 (1975).

Respondent was served with written notice of the suspension and the next day he was served with an amended notice, informing him of his right to challenge the suspension. Respondent requested a hearing which was conducted, with Respondent represented by counsel, on December 8, 1982, before a County personnel officer. The hearing officer upheld the temporary suspension as appropriate. On December 30, 1982, Bergna notified Respondent of his final decision to impose a 30-day suspension without pay, effective retroactively for the period of suspension pending investigation. Respondent was without pay for a period of only one month, beginning November 26, 1982. Respondent was reinstated to his position as a Deputy District Attorney without loss of status as of the beginning of January 1983.

Respondent requested and received a "Skelly" hearing to review his final 30-day suspension. After that hearing, on March 15, 1983 before another County personnel officer, the 30-day suspension was upheld. County rules gave Respondent the right to a further appeal hearing before a neutral, five-member Personnel Board, and Respondent was notified of that right. Respondent initially appealed to the Personnel Board; however, after filing proceedings in state Superior Court pertaining to discovery in the administrative proceedings, he apparently abandoned his administrative appeal.[5] Respondent has continued to work as a Deputy District Attorney of

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[5]The District Court has dismissed Respondent's state and County law claims for failure to exhaust administrative remedies (Order of District Court, entered February 12, 1991, pp.1-3).

Santa Clara County to the present time.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DIRECTION IN ANDERSON V. CREIGHTON CONCERNING PROPER APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE.

This Court should grant certiorari because the Court of Appeals decision fails to follow the teaching of Anderson v. Creighton, 483 U.S. 635 (1987), with respect to the method of determining whether challenged official conduct was in violation of "clearly established law" and therefore outside the protection of qualified official immunity. Rule 10.1(c). Specifically, the Ninth Circuit's decision ignores Anderson's requirement of a particularized application of the law to the facts of the case. The Ninth Circuit's erroneous approach to that determination presents a

significant federal question, first visited in Anderson, which warrants review in this case for the purpose of ensuring that the principles announced in Anderson not be undermined in the lower federal courts.

1. In Anderson v. Creighton, supra, the Court announced standards for applying the qualified immunity doctrine designed to serve the doctrine's fundamental purpose of properly balancing the need to provide citizens with a means "'for vindication of constitutional guarantees'" with the need to minimize "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Anderson v. Creighton, supra, 483 U.S. at 638, quoting and citing Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Indeed, this Court has

recently emphasized that the purpose of the qualified immunity doctrine is to protect public officials from the burdens of unnecessary litigation. Siegert v. Gilley, ____ U.S. ____, 59 U.S.L.W. 4465, 4467 (May 23, 1991).

Accordingly, in Harlow the Court announced the rule "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." 457 U.S. at 818. Determination of whether such rights were "clearly established" at the time of the action requires an objective review of the "legal rules" applicable at the time of the challenged official action. Id.

The Court in Anderson emphasized that the effectiveness of Harlow's

qualified immunity doctrine in serving its purpose would "depend[] substantially upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639. If defined at too broad or abstract a "level of generality," the relevant legal rule would undermine Harlow's touchstone of "objective legal reasonableness" and inhibit exactly the type of official action that the qualified immunity doctrine is designed to encourage. Id.

In the particular case of Due Process Clause claims, "there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." Id. Thus, if applied too generally, the "clearly established law" test becomes tautological, providing a

mere equivalent of the outcome on the ultimate merits determination on the constitutional claim rather than an official immunity from at least some such claims. Public officials like Petitioner Bergna would be inhibited in their official actions by such a generalized application of the "clearly established law" test.[6]

For those reasons, Anderson held that

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would

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[6]The ultimate, illogical consequence of such a generalized approach is illustrated by the Court of Appeals' observation in this case that it is for the jury to decide whether Bergna's actions were "reasonable" (App. 9a). If immunity applies, it must protect officials from being subjected to the burdens and vagaries of trials. Mitchell v. Forsyth, supra, 472 U.S. at 526; Siegert v. Gilley, supra, 59 U.S.L.W. at 4467.

> understand that what he is doing violates that right. . . . [I]n light of preexisting law the unlawfulness must be apparent. 483 U.S. at 640 (emphasis supplied).

That is the important standard which the Court of Appeals, despite its pro-forma citation to Anderson (App. 6a), disregarded in deciding this action.

2. Contrary to this Court's direction in Anderson that qualified immunity analysis must be "particularized," the Court of Appeals defined the due process issues before it abstractly and only in general terms.

As to Petitioner's due process deprivation of property claim, the Court of Appeals first held that it was "clearly established" in 1982 "that a temporary suspension, as opposed to a discharge, could implicate the procedural

protections of the due process clause" (App. 7a) (emphasis supplied).[7] The Court cited two cases, one involving suspension of students from public schools (Goss v. Lopez, 419 U.S. 565 (1975)) and the other involving suspension of VA educational benefits (Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980)), for its proposition. The Court did not cite to any due process case involving temporary suspension from employment, and in 1982 there was no federal case law which required pre-suspension due process in the employment

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[7]The issue was not whether the suspension "implicated" Respondent's due process rights, a point which Bergna has never denied, but rather whether, in determining what process was due to Respondent, it was clearly established in 1982 that he was entitled to a hearing before the temporary suspension pending further investigation.

context.[8] The then-extant federal authorities which required predeprivation hearings in the employment context as a matter of due process all involved termination. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972), Perry v. Sinderman, 408 U.S. 593 (1972), Arnett v. Kennedy, 416 U.S. 134 (1974), and Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

Second, the Court of Appeals held, without regard to the specific context, that under the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), "where predeprivation process is feasible, it must be afforded before a person may be deprived of a protected

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[8]The opinion in Goss v. Lopez underscores the relevance of this distinction since the Court there emphasized the unique importance of local government's duty to provide public education. 419 U.S. at 576.

interest" (App. 7a) (emphasis supplied). The Court cited three Ninth Circuit cases, two of which were decided post-1982.[9] One of these cases involved neither employment nor any qualified immunity issue (Sinaloa Lake Owners' Ass'n v. City of Simi Valley, 864 F.2d 1475 (9th Cir. 1989), modified in unrelated part, 882 F.2d 1398 (9th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1317 (1990)); and the other two (Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987), and Vanelli v. Reynolds School Dist. No. 7, supra) both involved terminations rather than suspensions. In painting with its broad brush on this

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[9]As the Ninth Circuit itself has held, post-incident decisions cannot properly be considered in determining whether the action violated then clearly established standards. Capoeman v. Reed, 754 F.2d 1512, 1515 (9th Cir. 1985); Thorne v. City of El Segundo, 802 F.2d 1131, 1139 (9th Cir. 1986).

question, the Court of Appeals simply ignored two decisions of this Court (one pre-1982) which explicitly hold, in the context of suspensions of employment, that post-deprivation process may, in some particular factual settings, provide constitutionally adequate due process. See FDIC v. Mallen, 486 U.S. 230, 240 (1988), and Barry v. Barchi, 443 U.S. 55, 64 (1979).

The Court of Appeals' decision was thus too generalized to conform with the particularity of application required by Anderson v. Creighton, supra. A California public official acting reasonably and in good faith in 1982 might well have concluded that the generalized due process authorities identified by the Court below did not apply to the particular official action in question. Indeed, the official could

objectively have looked to the Vanelli decision itself, which twice explicitly suggests that although due process requires a pre-termination hearing, "[i]mmediate action short of outright dismissal, perhaps suspension" could satisfy the school district's legitimate interests for immediate action and could therefore pass constitutional muster. 667 F.2d at 779 and n.9 (emphasis supplied). Moreover, this Court confirmed after Vanelli, in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544-45 (1985), that a public employee's suspension might not trigger the same predeprivation hearing requirement as did a termination.

In addition, such an official could also have reasonably relied, as did Petitioner, on state and local law which suggested that for a brief temporary

suspension no predeprivation hearing was required.[10] California state law was particularly unsettled in 1982 with respect to the process due temporarily suspended employees; indeed, the only pronouncements on the subject indicated that prior notice and hearing was not required. Compare Skelly v. State Personnel Bd., 15 Cal.3d 194 (1975) (requiring pre-termination notice and hearing) with Civil Serv. Ass'n v. City and County of San Francisco, 22 Cal.3d 552, 562 (1978) (no requirement of prior notice and hearing for 5-day suspension where prompt post-suspension process

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[10]Where, as here, no binding precedents existed which specifically made the official's conduct unlawful, the court "should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established. . . ." Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), cert. denied, 483 U.S. 1020 (1987).

available) and Taylor v. State Personnel Bd., 101 Cal.App.3d 498, 504 (1980) (no pre-suspension notice and hearing required for 10-day suspension). The Santa Clara County ordinances, Santa Clara County Code §§ A25-302 and -303, which are quoted at pages 4-5 above, also authorized a 30-day suspension without prior hearing.

In short, the authorities most directly applicable to the circumstances confronting Petitioner in 1982 suggested that a temporary suspension with prompt post-suspension process could satisfy due process standards.

Similarly, as to Respondent's due process liberty interest claim, the Court below framed its inquiry too broadly to comply with Anderson. It cited no pre-1982 authority -- and there was none -- holding that an employee's temporary

suspension without a predeprivation hearing violates his occupational liberty interest where an adequate post-deprivation "name-clearing" hearing is provided. Instead, it cited only an education case (Goss v. Lopez, supra), a later-decided out-of-state district court decision (Click v. Board of Police Comm'rs, 609 F.Supp. 1199, 1204 (W.D. Mo. 1985)), and its own Vanelli decision which itself, as stated above, distinguished discharge cases from suspension situations.[11]

The particularized analysis required

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[11]The Ninth Circuit's citation to Vanelli's statement at 667 F.2d at 778 n.8, that a post-deprivation hearing was inadequate, is unpersuasive. A crucial factor in the balancing test applied by the court there, reflecting the critical difference between discharges and suspensions, differentiates Vanelli from this case. Since Vanelli had been discharged, a pre-termination hearing was required to protect his property rights in his job, so the additional burden of a name-clearing hearing was minimal. Id.

by Anderson -- and avoided by the Court of Appeals -- shows that a public official acting reasonably and in good faith in 1982 might well have concluded that the generalized liberty interest authorities cited by the Court below did not apply to the action he contemplated. He might well have relied, in that belief, on three then-extant decisions of this Court which strongly suggested that an adequate post-deprivation hearing procedure could substitute for predeprivation due process. See Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (plurality opinion for three Justices), and id. at 170-71 (concurring opinion for two Justices) (post-termination "name-clearing" hearing procedures held adequate to satisfy civil servant's due process liberty interest); and see Parratt v. Taylor, 451 U.S. 527, 540-44

(1981), and Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-36 (1982).[12]

The fact that Respondent was "clearly a public figure" (App. 50a) highlights the need for a particularized application of broad constitutional principles to the facts of specific cases where immunity is claimed. The application of at least two parts of the three-part balancing test of Mathews v. Eldridge, supra, may be quite different in Respondent's case because he had thrust himself into the electoral spotlight. As a candidate for public office,

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[12]While the applicability of Parratt v. Taylor has been clarified and limited in recent years (see Daniels v. Williams, 474 U.S. 327 (1986)), in 1982 its scope was far from clear. See, e.g., Note, "Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct," 71 Cal. L.Rev. 253, 269 (1983) (courts in disagreement over mental states and interests covered by Parratt). See also Economic Dev. Corp. of Dade County v. Stierheim, 782 F.2d 952, 953 (11th Cir. 1986) (referring to "the quagmire of Parratt v. Taylor").

Respondent exposed himself to searching public scrutiny. The private interest he alleges Bergna violated by the challenged action may be attenuated by Respondent's candidacy. And the government's interest in bringing all relevant information about the candidates to the public's attention before the election is significant. Moreover, as decisions of this Court recognize, candidates for elective office and other public figures are often required to endure stigmatizing public comments that for ordinary citizens would be actionable. See Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988); Monitor Patriot Co. v. Roy, 401 U.S. 265, 273-75 (1971); Buckley v. Valeo, 424 U.S. 1, 14 (1976). A public official like Bergna, knowing of these First Amendment-based authorities, might reasonably conclude that such a candidate's interest in

procedural niceties must give way to the public's need to know all the relevant facts about the conduct of the candidate as a public employee. A particularized application of the law to this case, as required by Anderson, would have required consideration of that significant factor.[13]

3. In the particular circumstances Petitioner Bergna confronted in 1982 -- involving the temporary suspension pending investigation, on charges of

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[13]Indeed, the Ninth Circuit failed in its analysis even to consider whether, as a candidate for office, Respondent could be stigmatized for liberty interest purposes. Cf. Siegert v. Gilley, 895 F.2d 797, 803 (D.C. Cir. 1990), aff'd on other grounds, Siegert v. Gilley, supra, ____ U.S. _____ (common law privileges to defamation must be part of analysis of qualified immunity to liberty interest claim). Thus, the Ninth Circuit did not take into account that the District Court had already dismissed Respondent's defamation claims on grounds that Respondent was a public figure and that Petitioner had not made any statements about him with "actual malice" as required by New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny (see App. 50a-54a).

serious impropriety, of an employee who was then a candidate for elective office -- the law did not clearly establish, "in a more particularized, and hence more relevant, sense," Anderson v. Creighton, supra, 483 U.S. at 640, that Respondent was entitled to a pre-suspension hearing to protect either his property or liberty rights. Hence, the alleged "unlawfulness" of Bergna's conduct could not have been "apparent" to a reasonable public official -- particularly one in Santa Clara County, California, where local and state law apparently authorized him to proceed without a pre-suspension hearing.

The Fourth Circuit has held, after citing Anderson v. Creighton, supra, that the mere existence of apparently conflicting, or at least unsettled, precedents is sufficient to give rise to

qualified immunity. Clark v. Brown, 861 F.2d 66, 68 (4th Cir. 1988). Yet the Ninth Circuit's decision would deprive such public officials of their qualified immunity from claims for damages merely because in a generalized sense, the Due Process Clause had been held to require that some private figure public employees be given predeprivation hearings before losing non-employment benefits, and to require that some public employees be given pre-termination hearings before they were permanently discharged from their jobs. That holding undermines Anderson and the policy goals it expresses.

4. The Ninth Circuit's casual regard for Anderson is at odds with the more careful application of the policies underlying Anderson's particularity requirement by other Courts of Appeals.

In its insightful decision in Colaizzi v. Walker, 812 F.2d 304 (7th Cir. 1987), an employment termination case, the Seventh Circuit anticipated Anderson by engaging in a careful analysis in order to determine "whether the law was clear in relation to the specific facts confronting the public official when he acted." Id. at 308 (emphasis supplied). The Court aptly observed,

> That test [of "clearly established" law under Harlow v. Fitzgerald] would have little bite if a right "clearly established" at any level of generality could survive it. The words 'clearly established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms.
>
> . . . The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful.

> . . . We must be wary both of using hindsight to make an untidy body of case law seem clear and directive at the time the public official was called on to act, and of imagining that public officials have the training and experience in extracting legal rules from case law that appellate judges have.

Id. at 307-08. The Seventh Court has reiterated its adherence to a particularized approach in several other pre- and post-Anderson decisions in qualified immunity cases. See Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986); Powers v. Lightner, 820 F.2d 818, 821 (7th Cir. 1987), cert. denied, 484 U.S. 1078 (1988); Auriemma v. Rice, 910 F.2d 1449, 1455 (7th Cir. 1990) (en banc), pet. for cert. filed, 59 U.S.L.W. 3307 (Oct. 12, 1990).

In Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255 (1st Cir. 1987), the First Circuit rejected the

plaintiff's generalized approach which failed to acknowledge that the "[constitutional] right in question does not apply to all individuals and neglected to indicate why he or she falls within the sphere of protection." Id. at 1260. The First Circuit upheld a qualified immunity defense only after it engaged in a detailed analysis of the pertinent facts about the employment setting. The Second Circuit in Dobosz v. Walsh, 892 F.2d 1135 (2nd Cir. 1989), engaged in a careful factual inquiry into the circumstances surrounding the deprivation of a pre-suspension hearing for a police officer before concluding that in those particular circumstances the defendant might reasonably have believed no such hearing was necessary and therefore enjoyed a qualified immunity. Id. at 1141. See also Powell

v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989) (observing that "the test for qualified immunity should not be applied in such a general way as to render the qualified immunity defense unavailable as a practical matter," id. at 1457, and engaging in a properly particularized discussion of the facts and law pertaining to the immunity issue); Price v. Brittain, 874 F.2d 252, 260-61 (5th Cir. 1989) (qualified immunity upheld after careful examination of particular Fifth Circuit decisional law governing sufficiency of post-suspension hearing on employee's claims prior to Loudermill decision requiring predeprivation hearing); and Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 101 (1989) (question as to whether law was "clearly established" as to a search and seizure

claim must be "sharply focussed" on facts of the case).

The principle exemplified by the decisions in Colaizzi and other Seventh Circuit cases, Mendez-Palou, Dobosz, Powell, Price, and Barts -- and notably absent from the Ninth Circuit's disposition of this case -- is that the determination, for qualified immunity purposes, of whether the law is clearly established must be a particularized one based on application of pertinent legal principles to the particular circumstances confronting the defendant official. In this case, the Ninth Circuit failed to conduct any such particularized inquiry, and based its rejection of Petitioner's qualified immunity defense on a broad-brush application of generalized constitutional principles without paying attention to

the particular facts of the case -- the specifics of the problems that public officials are called upon to resolve day in and day out.

The Ninth Circuit's generalized approach, if allowed to stand, could lead to disregard of this Court's important decision in Anderson v. Creighton. More important still, such disregard would undermine the willingness and ability of many thousands of public officials to make particular decisions as the public interest requires, and thereby subvert a major rationale of the qualified immunity defense.

The manner in which the appellate courts apply the particularity requirement of Anderson v. Creighton is of major importance in all the Circuits. Numerous decisions in cases involving qualified immunity defenses to

employment-related claims -- many of them in the Ninth Circuit alone -- will be affected by the method by which the "clearly established law" standard is applied, and proper resolution of those claims and defenses would be enhanced by the Court's review of the improperly generalized method utilized by the Court of Appeals in this case. For that reason, certiorari should be granted.

Alternatively, this Court may wish to consider granting certiorari, summarily reversing the Ninth Circuit's decision, and instructing the Ninth Circuit to reverse the District Court's denial of summary judgment on the qualified immunity issue in this case. Such a disposition would correct a manifest error in the Ninth Circuit's approach to that issue and assure that

Court's compliance with the approach required by Anderson v. Creighton.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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Dated: May 29, 1991

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIUS L. FINKELSTEIN, *Plaintiff-Appellee,* v. LOUIS P. BERGNA, *Defendant-Appellant.*	No. 87-2943 D.C. No. CV-83-5125-TEH ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
December 14, 1988—San Francisco, California

Filed August 2, 1989
Opinion Withdrawn January 29, 1991
Filed January 29, 1991

Before: Betty B. Fletcher and Robert R. Beezer, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge Beezer: Partial Concurrence, Partial Dissent by Judge Fletcher

*The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

1a

SUMMARY

Constitutional Law

Withdrawing its prior opinion, and affirming in part and reversing in part a district court grant of summary judgment, the court of appeals held that the temporary suspension of a deputy district attorney implicated the procedural protections of the due process clause.

Julius L. Finkelstein was a deputy district attorney working for Louis Bergna, the elected District Attorney in Santa Clara County. In 1982, Finkelstein and Leo Himmelsbach, another deputy attorney, were running for Bergna's position. Bergna supported Himmelsbach's bid to succeed him in office. Finkelstein lost the election. Shortly before the election, Finkelstein was suspended by Bergna on the basis of his unauthorized entry into personnel files and subsequent leak to the press of information concerning Himmelsbach's allegedly improper conduct while a deputy district attorney. Bergna's comments on Finkelstein's suspension received widespread coverage in the newspapers. Finkelstein alleged that the suspension, and its announcement at a press conference, were intended to thwart his bid for office. Finkelstein challenged the propriety of the suspension in postsuspension hearings. He lost those challenges. Finkelstein brought suit against Louis Bergna, claiming violations of first and fourteenth amendment rights. The district court denied Bergna's motion for summary judgment on the basis of qualified immunity from suit.

[1] An official is entitled to qualified immunity when the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The unlawfulness of the challenged conduct must be apparent in light of preexisting law. [2] Bergna's argument that it was not clearly established in 1982 that a

temporary suspension, as opposed to a discharge, could implicate the procedural protections of the due process clause was incorrect. [3] So was his argument that the post-deprivation process afforded Finkelstein was sufficient to meet the requirements of the due process clause. Where pre-deprivation process is feasible, it must be afforded before a person may be deprived of a protected interest. [4] Therefore, the district court correctly concluded that Finkelstein alleged a violation of clearly established law. Accordingly, the appellate court affirmed the denial of qualified immunity with regard to the property interest claim. [5] The court agreed that Finkelstein's suspension deprived him of a liberty interest without due process of law. The court disagreed with Bergna's contention that it was not clearly established that a temporary suspension could implicate a liberty interest. [6] The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charges, and it is made in connection with the termination of employment or the alteration of some right or status recognized by state law. Finkelstein alleged a cognizable liberty interest claim. [7] The district court correctly concluded that Finkelstein alleged a violation of clearly established law and thus the appellate court accordingly affirmed the denial of qualified immuntiy on the liberty interest claim. [8] Bergna's argument that his suspension of Finkelstein was reasonable and authorized by state law, thereby entitling him to qualified immunity, misconceived the question at issue. The question before the court was not whether Bergna's actions were reasonable under state law, but whether the challenged conduct violated clearly established federal law, here the due process clause of the fourteenth amendment. It was for the jury to decide whether Bergna's conduct was reasonable. [9] However, the court reversed the district court's conclusion that Bergna was not entitled to qualified immunity on the first amendment claim. [10] Although it was clearly established by 1982 that public employees could not be disciplined solely for exercising first amendment rights, it was not clearly estab-

lished at that time that prosecutors were protected by the first amendment from such disciplinary action. [11] The court could not conclude, in light of pre-existing law, that the unlawfulness of Bergna's conduct was clearly established in 1982. The court hastened to add, however, that it rejected the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights. Therefore, the court affirmed the district court's denial of Bergna's motion for summary judgment on all but the first amendment claims.

Judge Fletcher concurred in part and dissented in part. She stated the panel erred in granting rehearing. Although much of the revised opinion was sound, she dissented from the reversal of the denial of summary judgment on the basis that Bergna was entitled to qualified immunity on Finkelstein's first amendment claim. Judge Fletcher parted with the majority where it concluded that the law was not clearly established in 1982 that the first amendment protected a deputy prosecutor, particularly one who was protected from disciplinary action for his political opinions by the county's own rules.

COUNSEL

Craig M. Brown, San Jose, California, for the defendant-appellant.

Alan B. Exelrod, San Francisco, California, for the plaintiff-appellee.

ORDER

The petition for rehearing is granted. The opinion filed August 2, 1989, and published at 881 F.2d 702, is withdrawn. The suggestion for rehearing en banc is dismissed as moot.

OPINION

BEEZER, Circuit Judge:

The petition for rehearing is granted. The opinion filed August 2, 1989, and published at 881 F.2d 702, is withdrawn. The suggestion for rehearing en banc is dismissed as moot.

OPINION

BEEZER, Circuit Judge:

Julius Finkelstein brought suit against Louis Bergna in federal court under 42 U.S.C. § 1983 claiming violations of first and fourteenth amendment rights in addition to several pendent state law claims. Bergna moved for summary judgment on the ground that he was entitled to qualified immunity from suit on all claims. The district court denied Bergna's motion. Bergna appeals. We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We reverse the district court's denial of summary judgment on the first amendment claim and affirm in all other respects.

In 1982 Julius Finkelstein was a deputy district attorney in Santa Clara County, California. Finkelstein worked for Louis Bergna, the elected District Attorney in Santa Clara County. Bergna did not run for reelection in 1982. Finkelstein and Leo Himmelsbach, another deputy district attorney, were running for Bergna's position. Bergna supported Himmelsbach's bid to succeed him in office. Finkelstein lost the election.

Shortly before the election, the press received information about Himmelsbach's allegedly improper conduct while a deputy district attorney in 1974. Bergna believed that Finkel-

stein was the source of the "leak" to the newspapers and that Finkelstein had retrieved the leaked information by making unauthorized entry into the office's confidential personnel files. Bergna suspended Finkelstein without providing him an opportunity to deny that he was responsible for the leak. Immediately thereafter, Bergna held a press conference announcing Finkelstein's suspension and implicating Finkelstein in the unauthorized entry into the personnel files and the subsequent leak to the press. Bergna's comments received widespread coverage in the newspapers. Finkelstein alleges that the suspension, and its announcement at a press conference, were intended to thwart his bid for office.

A subsequent report from the Attorney General's office stated that there was insufficient evidence to determine who leaked the information to the press. Further, due to lax record keeping in the office, it could not be determined whether access to the personnel files had been accomplished in an unauthorized manner. Finkelstein challenged the propriety of the suspension in postsuspension hearings. He lost those challenges. Finkelstein was reinstated to his position and continues to work as a deputy prosecutor in Santa Clara County. This suit followed.

I

[1] An official is entitled to qualified immunity when the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1211 (9th Cir. 1988). In order for an official to violate clearly established rights, the unlawfulness of the challenged conduct must be apparent in light of preexisting law. *Anderson v. Creighton*, 483 US. 635, 639 (1987). Whether the law was clearly established is a question of law reviewed de novo. *Brady v. Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1577 (1989).

A

Bergna concedes that Finkelstein has a protected property interest in his job under California law. Once a protected interest is found, the inquiry turns to what process is due. *Orloff v. Cleland*, 708 F.2d 372, 378-79 (9th Cir. 1983).

[2] Bergna contends that it was not clearly established in 1982 that a temporary suspension, as opposed to a discharge, could implicate the procedural protections of the due process clause. Bergna is incorrect. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975)(suspension of student implicated liberty and property interests requiring procedural due process); *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980)(suspension of VA educational benefits required presuspension process).

[3] Bergna next contends that the post-deprivation process afforded Finkelstein was sufficient to meet the requirements of the due process clause. Bergna is again incorrect. Pursuant to the three-part test announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976), we have consistently held that where predeprivation process is feasible, it must be afforded before a person may be deprived of a protected interest. *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 864 F.2d 1475, 1481-83 (9th Cir.), *modified in unrelated part*, 882 F.2d 1398 (9th Cir. 1989); *Merritt v. Mackey*, 827 F.2d 1368, 1372 (1987); *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 778 (9th Cir. 1982).

[4] The district court correctly concluded that Finkelstein alleged a violation of clearly established law and we accordingly affirm the denial of qualified immunity with regard to the property interest claim.

B

[5] Finkelstein also claims that his suspension deprived him of a liberty interest without due process of law. Bergna

again contends that it was not clearly established that a temporary suspension could implicate a liberty interest. We disagree. *Goss*, 419 U.S. at 574-76 (ten-day suspension implicated a liberty interest); *see also Click v. Board of Police Comm'rs*, 609 F. Supp. 1199, 1204 (W.D. Mo. 1985)(three-day suspension implicated a protected liberty interest).

[6] In *Vanelli* — a discharge case — we stated that a liberty interest is "implicated if a charge impairs [one's] reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment *or the alteration of some right or status recognized by state law*." *Vanelli*, 667 F.2d at 777-78 (footnotes omitted and emphasis added). It is clear that Finkelstein's honesty and morality were impugned when Bergna intimated that he had gained access to confidential personnel files in an unauthorized, underhanded, and perhaps illegal manner. Finkelstein contested those publicly disclosed charges. He also alleges that his right to continued employment, a right or status conferred by state law, was altered by the suspension. Finkelstein thus alleges a cognizable liberty interest claim.

Bergna again argues that it was not clearly established that presuspension process is required when a liberty interest is at issue. He argues that the post-termination name-clearing hearing afforded to Finkelstein was alone sufficient to meet the requirements of due process. We have rejected that argument. *Vanelli*, 667 F.2d at 778 n. 8.

[7] The district court correctly concluded that Finkelstein alleged a violation of clearly established law and we accordingly affirm the denial of qualified immunity on the liberty interest claim.

C

[8] Bergna also contends that his suspension of Finkelstein was reasonable and authorized by state law, thereby entitling

him to qualified immunity. This misconceives the question at issue. The question before us is not whether Bergna's actions were reasonable under state law, but whether the challenged conduct violates clearly established federal law, here the due process clause of the fourteenth amendment. It is for the jury to decide whether Bergna's conduct was reasonable. *Brady*, 859 F.2d at 1556; *Thorsted v. Kelly*, 858 F.2d 571, 575-76 (9th Cir. 1988).

D

Bergna moved for summary judgment on the pendent state law claims and argued that *Harlow* immunity analysis should be applied to those claims. The district court rejected this argument. We agree with the district court and find this argument meritless for the reason stated by the Seventh Circuit. *Oyler v. National Guard Ass'n of United States*, 743 F.2d 545, 554 (7th Cir. 1984) (rejecting this argument as it would "obviously constitute an unwarranted interference by this court with the substantive law of [a state].").

II

[9] The district court also concluded that Bergna was not entitled to qualified immunity on the first amendment claim. Because the law was not clearly established in 1982, we reverse.

It was clearly established by 1982 that public employees could not be disciplined solely for exercising first amendment rights. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Disciplinary action discouraging a candidate's bid for elective office "represent[ed] punishment by the state based on the content of a communicative act" protected by the first amendment. *Newcomb v. Brennan*, 558 F.2d 825, 828-29 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). It was also clearly established that suspensions could

implicate first amendment rights. *See Peacock v. Duval*, 694 F.2d 644, 645 (9th Cir. 1982)(suspension and discharge case); *Porter v. Califano*, 592 F.2d 770, 776 (5th Cir. 1979)(thirty-day suspension implicated first amendment rights).

[10] Nevertheless, it was not clearly established in 1982 that *prosecutors* were protected by the first amendment from such disciplinary action. In *Elrod v. Burns*, 427 U.S. 347, 367, 372 (1976)(plurality opinion), the Supreme Court had recognized an exception to the general rule for public employees in policymaking positions. Several courts applied the *Elrod* exception to assistant prosecutors. *See Mummau v. Ranck*, 687 F.2d 9, 10 (3d Cir. 1982)(per curiam); *Newcomb*, 558 F.2d at 829-31. The Supreme Court, in *Branti v. Finkel*, 445 U.S. 507 (1980), held that the *Elrod* exception did not extend to assistant public defenders. But in a footnote, the Court stated:

> This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty.

Id. at 519 n. 13 (citing *Newcomb*).

Newcomb is particularly on point to our analysis here. In *Newcomb*, a deputy city attorney told his superior that he intended to run for Congress. His superior threatened to fire him if he ran; Newcomb ran anyway and was discharged. The court upheld this blatantly political firing, concluding that Newcomb's first amendment concerns were overridden by the city attorney's need for absolute loyalty. *Newcomb*, 558 F.2d at 829-31. The court in *Mummau* echoed the same rationale.

Newcomb and *Mummau* turned largely on determinations that assistant prosecutors were policymaking officials, thus

virtually at-will employees. The *Newcomb* court specifically recognized, in dicta, that a person with civil service status might be in a different and more protected position than a political appointee. 558 F.2d at 830. However, this distinction was not sufficiently clear from the case law in 1982 to deny a reasonable official in Bergna's position qualified immunity from Finkelstein's first amendment claim.

[11] We cannot conclude, in light of pre-existing law, that the unlawfulness of Bergna's conduct was clearly established in 1982. *Anderson*, 483 U.S. at 639. We hasten to add, however, that we reject the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights. Shortly after the Supreme Court decided *Branti*, it considered a first amendment challenge to the discharge of an assistant prosecutor. In *Connick v. Myers*, 461 U.S. 138 (1983), the Court concluded that Myers, an assistant prosecutor, had engaged in protected speech. *Id.* at 150-54. Even though it ultimately concluded that she could be discharged for other reasons, the Court made no reference to footnote 13 in *Branti*; Myers' position as an assistant prosecutor was unimportant to the Court's straightforward application of the general rule prohibiting discharge of public employees solely for exercising first amendment rights. *See also Giacalone v. Abrams*, 850 F.2d 79 (2nd Cir. 1988)(applying traditional balancing of interests in § 1983 claim brought by a prosecutor for violation of first amendment rights).

III

For the foregoing reasons, we affirm the district court's denial of Bergna's motion for summary judgment on all but the first amendment claims. The district court's denial of Bergna's motion for summary judgment on the first amendment claim is reversed and summary judgment shall be entered against Finkelstein on that claim. All other claims may pro-

ceed to trial. Accordingly, each party shall bear their own costs. The decision of the district court is

AFFIRMED IN PART and REVERSED IN PART.

FLETCHER, Circuit Judge, concurring in part and dissenting in part:

I think the panel errs in granting rehearing.[1] Much of the revised opinion is sound but I must respectfully dissent from the reversal in Part II of the denial of summary judgment on the basis that Bergna was entitled to qualified immunity on Finkelstein's first amendment claim. First, the law was clear that a deputy prosecutor's first amendment rights could not be infringed by disciplinary action. At the time of Finkelstein's suspension, the law clearly prohibited Bergna's action. Second, I must say I am at a loss to understand how the majority can agree that the law was clear that Finkelstein as a deputy prosecutor had a protected property interest in his job that would preclude his discipline without a pre-deprivation hearing but that the law was not clear that his job was of such a nature that his boss could not infringe his first amendment rights by suspending him without such a hearing.

I. *Finkelstein's Property Interest in His Employment*

In the due process analysis in the majority opinion in Part I, we note that "Bergna concedes that Finkelstein has a property interest in his job under California law." *See supra* at 964. Not only California, Cal. Lab. Code §§ 1101-1102 (West 1989),[2] but Santa Clara County, Finkelstein's employer, spe-

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[1] I would amend the original opinion to rely on other support than *Connick v. Myers*, 461 U.S. 138 (1983), but the result should remain the same and the essential reasoning is sound.

[2] Section 1101 reads:

cifically grants Finkelstein as deputy district attorney a property interest in his employment. As a civil service employee, Finkelstein did *not* serve at the pleasure of the elected District Attorney, Bergna, and could be disciplined only for cause. He could not be disciplined for political beliefs.

Article VII of the Santa Clara County Charter and Code in force in 1982 governed the county's personnel matters. Section 700 laid the ground rules:

> The personnel system of the county shall be based on merit and equal opportunity.
>
> Appointments and promotions in the administrative service of the county shall be made in conformance with merit system rules and all applicable law, including that pertaining to the effectuation of equal employment opportunities and affirmative action programs.
>
> No person employed or seeking employment with the county shall be unlawfully discriminated against

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No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

Section 1102 reads:

No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

> because of age, color, creed, national origin, political opinions, race, religion, sex, or union activity.

These rules govern the county's employment actions, including disciplinary action, involving classified employees, but not unclassified employees. Section 701 lists "*the*" district attorney as an unclassified position. Santa Clara County Charter & Code § 701(a)(1) (1976) ("All elective county officers"). However, deputy district attorneys are classified employees. *Id.* § 701(b) ("The classified service shall comprise all positions not specifically included by this article in the unclassified service.").

Finkelstein alleges in paragraph 1 of his second amended complaint that as deputy district attorney he was a permanent Santa Clara County employee in the classified service. Bergna admits this allegation in his answer and has agreed that Finkelstein has a property interest in his job.

II. *Disciplinary Action*

Bergna is not entitled to qualified immunity if the "contours" of Finkelstein's first amendment right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[I]n the light of pre-existing law the unlawfulness must be apparent." *Id.*

As the majority states, it was clearly established that Bergna could not discipline Finkelstein, as a public employee, solely for exercising his first amendment rights on matters of public concern. *See Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968). The majority also correctly asserts that suspensions are not exempt from this rule and that the first amendment protection extends to "disciplinary action discouraging a particular candidate's bid for elective office." *See supra* at 967.

I part ways with the majority where it concludes that the law was not clearly established in 1982 that the first amendment protected a deputy prosecutor, particularly one who was protected from disciplinary action for his political opinions by the county's own rules. The majority seems to interpret the case law as excluding prosecutors as a class from the general rule that public employees cannot be disciplined for exercising their first amendment rights. That interpretation is unjustified. The crucial issue is not what broad job category the employee falls into; it is what role the employee plays as defined by the public employer.

For Bergna to be exempt from liability, his discipline of Finkelstein "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit to be gained must outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion). The burden rests on the public employer to prove that the employee holds a policy-making position that restricts his right to speak out on a particular matter. *Id.* at 368. The *Elrod* plurality cited "the need for political loyalty . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. It concluded that limiting discipline "to policymaking positions is sufficient to achieve this governmental end." *Id.* Justices Stewart and Blackmun agreed with the plurality on this point, concluding that "a nonpolicymaking, nonconfidential government employee [cannot] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375 (Stewart, J., concurring).

The *Elrod* plurality addressed the defining characteristics of a policymaking employee. "The nature of the responsibilities is critical. . . . An employee with responsibilities that are not well defined or are of broad scope more likely functions

in a policymaking position. . . . [C]onsideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 367-68. In *Branti v. Finkel*, 445 U.S. 5607, 518 (1980), the Court further clarified, contrary to the majority's position, that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation [or political belief] is an appropriate requirement for the effective performance of the public office involved."

If a public employer gives an employee a property interest in her employment, defining the relationship by statute or regulation, the disciplinary measures available to ensure loyalty are limited necessarily to enforcement in conformity with the agreed employment terms. The disciplinary measures available to enforce loyalty against an employee who has no property interest in her job obviously are much broader. Including persons within the *Elrod* exception for whom the public employer has deemed such disciplinary measures unnecessary does not promote the exception's purpose. Such an employer cannot meet *Branti*'s requirement that the employer demonstrate that the employee's political loyalty is necessary to effective job performance. *Branti*, 445 U.S. at 518. The employer's employment policy instead conclusively demonstrates the opposite: the employer has found that the employee's functions do *not* require the loyalty implicated by *Elrod*. *See Newcomb v. Brennan*, 558 F.2d 825, 830 (7th Cir. 1977) (city's exemption of city attorney from civil service was "presumably" because it required his absolute loyalty). A corollary of *Elrod*, then, is that public employees given a property interest in their employment necessarily do not fall within *Elrod*'s exception to the rule against discipline because of political activity.

Two circuit court decisions applying *Elrod* lend strength to my disagreement with the majority's reading of the case law. Although both courts decided in favor of the defendant, their

reasoning put government officials like Bergna on notice that they could not discipline subordinates who lacked policymaking power for political reasons. In looking only at the cases' results and not at how the courts reach those results, the majority misunderstands the policy behind *Elrod* and misconceives the nature of the qualified immunity inquiry.

The more recent case, *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982), held that an assistant district attorney qualified for the *Elrod* exception. The third circuit affirmed the district court relying on the type of analysis set out in *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981). In holding that Mayor Marshall could dismiss the plaintiffs—a city solicitor, an assistant city solicitor, and a second assistant city solicitor—because of political party affiliation, the *Ness* court examined the solicitors' duties as defined in the city's administrative code. *Id.* at 521. They were appointed by and served at the pleasure of the mayor, *i.e.*, they had no property interest in their jobs. They advised and represented the city in its legal matters; they did not serve as prosecutors. These responsibilities involved the solicitors in policymaking and "broad administrative roles." *Id.* (quoting district court memorandum decision). Although the *Ness* court affirmed a summary judgment for the defendant government officials, the court noted that summary judgment is not appropriate where evidence exists that supports the employee's claim to a nonpolicymaking role, especially since the government bears the burden of proving a policymaking role. *Id.* at 522. *Mummau* relies on *Ness*'s case-by-case approach and on the district court's determination that "Pennsylvania statutory and case law relating to the obligations of Pennsylvania's district attorneys and their assistants" justified finding that the plaintiffs fit the policymaking description. *Id.* at 10. An assistant district attorney in Pennsylvania has duties consonant with the district attorney, which include "render[ing] legal advice implementing policy." *Mummau v. Ranck*, 531 F. Supp. 402, 404-05 (E.D. Pa. 1982).

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The other case on which the majority relies differs from the case before us in crucial respects. *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977). Newcomb, a deputy city attorney, decided to run for Congress. Brennan, who as the city attorney was Newcomb's superior, told Newcomb that he would fire him if he did not withdraw from the race. When Newcomb persisted, Brennan followed through on his threat.

After finding that the first amendment protected Newcomb's "interest in seeking office," the court agreed with the district court's finding that Newcomb was a policymaker. Newcomb was exempt from civil service. *Id.* at 827. The city code and charter imposed upon deputy city attorneys all of the duties of the city attorney, "including conducting all the law business of the city, drafting ordinances, and supervising assistant city attorneys." *Id.* at 829. Newcomb was also in line to succeed the Mayor if a vacancy occurred. *Id.* The court concluded that these facts "clearly established that [Newcomb's] duties were of the 'broad scope' which the *Elrod* Court equated with a policymaking function." *Id.*

The court also held that the city's interest in being able to dismiss Newcomb outweighed Newcomb's first amendment rights. *Id.* at 830. The court described Newcomb's role as "highly discretionary." *Id.* Many of his decisions would implement the city attorney's policies, and some would actually create policy. The court concluded that these responsibilities required a deputy city attorney's absolute loyalty, surmising that "[i]t is presumably for this reason that the . . . City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive." *Id.*

The majority seeks to apply *Elrod*'s exception to prosecutors as a category and cites *Newcomb* in support. While focusing on *Newcomb*'s result, the majority totally ignores the *Newcomb* court's reasoning on the qualified immunity claim.

Like the Third Circuit in *Mumman*, the *Newcomb* court did a functional analysis of the plaintiff's job responsibilities. It did not assume, as the majority does, that all persons with a particular broad job label, like "prosecutor," are excepted from the general rule against discipline because of exercise of first amendment rights. The Seventh Circuit looked specifically at the city's code and charter to determine exactly what Newcomb's responsibilities were and whether they demonstrated that the city considered him a policymaker. Both *Ness* and *Newcomb* relied on the plaintiffs' exemption from civil service, and *Mumman* relied on the statute to define plaintiff's employment status. In other words, by distinguishing persons specifically given a property interest in their employment by statute or regulation, these cases strongly support the conclusion that a public employee such as Finkelstein is not a policymaker falling within the *Elrod* exception if his employer guarantees him a property interest in his job.

Finkelstein's employment status differs markedly from the plaintiffs' in *Ness*, *Newcomb*, and *Mumman*. Finkelstein has a property interest in his job guaranteed him by the county charter governing his employer, the county. Santa Clara County's Code and Charter prohibits discriminating against him on the basis of political opinion. California law also prohibited any effort on Bergna's part to restrain Finkelstein's candidacy. The plaintiffs in *Ness* and *Newcomb* did not have such a property interest, nor did Mumman.

On an even more elementary level, not even *Newcomb*'s result supports the majority's use of the case to the effect that existing case law excluded all prosecutors from property interests in their jobs. The majority states that *Newcomb* is particularly on point factually; it is not. In addition to Newcomb being exempt from civil service, he was *not* a prosecutor of any kind, assistant or otherwise. He served as the city's counsel, which did not include prosecutorial duties. There is a significant difference between the responsibilities of a city's counsel, representing and advancing the city's interests, and

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a prosecutor, an officer of the court charged with doing justice under the criminal law.

The majority concludes that a footnote in *Branti*, 445 U.S. at 507 n.13, demonstrates that the law regarding prosecutors was unsettled at the time of Finkelstein's suspension. *See supra* at 969. *Branti* held that the county could not dismiss assistant public defenders on the basis of political party affiliation. The court stated that "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." *Id.* at 507. In the footnote to this sentence, the Court noted, "This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty." *Id.* n.13.

Contrary to the inferences the majority draws from this footnote, the Court, although implying that *the* prosecutor "with broader public responsibilities" than public defenders might be in a different category from them, clearly separated out the *deputy* prosecutors as different from the chief prosecutor. Probably *no* inferences should be drawn from the footnote one way or another, certainly not those that the majority would draw. The footnote simply notes that the issue is *not* before the Court so it has no occasion to decide the issue—nothing in the opinion should be taken to reflect a specific position on the issue. It does nothing to settle *or* unsettle the law. Essentially, the only relevance of the Supreme Court's nondecision is that the chief prosecuting attorney *remains* subject to liability for violations of his assistants' first amendment rights under the case-by-case inquiry mandated by *Elrod* and applied in *Ness*, *Mummau*, and *Newcomb*.

Neither *Branti*, *Mummau*, nor *Newcomb* support the majority's understanding of the law. Finkelstein's status as a deputy prosecutor does not automatically give Bergna qualified immunity. The law was well settled on this point at the

time of the suspension. Neither has Bergna justified the majority's grant of qualified immunity at the summary judgment stage on the facts. Bergna must present evidence that would lead us to conclude *as a matter of law* that Finkelstein was in a policymaking position in order for us to find that the district court erred in denying summary judgment. The majority's holding granting qualified immunity to Bergna on summary judgment is difficult to understand in the face of Finkelstein's evidence that he had a property interest in his job, which Bergna has conceded, and that he was not a policymaking employee. On the other hand, the record reveals that Bergna, who has the burden of proof, has offered *no* evidence to support the position that Finkelstein is a policymaker. In fact, he has conceded Finkelstein's factual allegation by agreeing that Finkelstein has a property interest in his employment.

Although the majority's grant of summary judgment to the party who has presented no evidence and against the party whose crucial factual allegation is conceded amazes me, I find even more inexplicable the majority's first amendment analysis in light of its due process analysis. In the majority's view, Finkelstein has a property interest in his job, so Bergna *cannot* deprive him of that interest by violating his due process rights. Bergna *can*, however, deprive him of his property interest by violating his first amendment rights. This makes no sense. If the county has seen fit to grant him that property interest, specifically prohibiting discipline because of his political activities, how can the majority justify a diametrically opposed finding that the county must consider his loyalty so important that it should be able to suspend Finkelstein for political activity, even if it violates Finkelstein's constitutional rights? Either he has a property interest in his job that entitles him to a hearing before suspension or he has no such property interest. The majority takes away in the first amendment analysis that which it has rendered in the due process analysis.

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CONCLUSION

The initial panel opinion was flawed in its reasoning in that it relied on *Connick*, a case that post-dated the events in this case, to support its holding that the law was well-established. However, pre-*Connick* law was well-established, although not as nicely packaged as in *Connick*. On the facts of this case where the county charter and code spells out Finkelstein's role and his rights as deputy prosecutor, including his first amendment rights and property right in his job, the parties and the majority agree he has a property right in his job. The majority agrees that he is entitled to a hearing before suspension from his job and that the law was well settled on this point. On these facts, to grant qualified immunity to *Bergna* at the summary judgment stage on the first amendment claim is extraordinary, illogical, and wrong. I would affirm the district court.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIUS L. FINKELSTEIN,	)	
Plaintiff,	)	
v.	)	No. C 83 5125 TEH C 84 1391 TEH
LOUIS P. BERGNA, et al.,	)	ORDER
Defendants.	)	

This matter is before the Court on defendant Bergna's motion for summary judgment, and defendant Santa Clara County's motion for partial summary judgment.

BERGNA'S MOTION FOR SUMMARY JUDGMENT

Bergna, while he was the Santa Clara County district attorney, suspended plaintiff from his job as an assistant

district attorney. Bergna took this action after being informed that plaintiff had gone through confidential personnel files pertaining to another assistant district attorney, Himmelsbach, who was plaintiff's opponent in an upcoming election. Bergna had supported Himmelsbach's campaign. Bergna suspended plaintiff without prior notice and hearing, and held a press conference announcing the suspension, about one week before the election. Plaintiff lost the election. This incident occurred in 1982.

Plaintiff asserts claims against Bergna for violation of his right to due process as to his property interest in government employment; violation of his first amendment protection against discrimination on the basis of political opinions; conspiracy to violate these due

process and first amendment rights; common-law invasion of privacy; and violation of the California Labor Code and of the Santa Clara County Charter.

Bergna moves for summary judgment on the basis of the federal qualified immunity doctrine, that a state actor is not liable for civil rights violations unless the clearly established law at the time of the incident put him on notice that his actions were unlawful. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Bergna argues that this doctrine applies to both the federal and the state law claims. He also claims immunity as to the state law claims under Cal. Govt. Code § 820.2, which provides immunity for policy decisions made by state agents.

This Court's Order of June 23, 1986 denied Bergna's motion for summary judgment, on these and other grounds, as

to the federal claims. The issue of qualified immunity had not been fully briefed, however, so this denial was without prejudice to Bergna's renewal of a summary judgment motion on a showing that the clearly established law in 1982 did not give notice that his actions would violate plaintiff's constitutional rights. Bergna has now made such a renewed motion.

Qualified Immunity

The qualified immunity defense protects state officials who could not have known that their conduct was unlawful, because the applicable law was not clearly established at the time. Harlow, 457 U.S. at 817-19. The question presented by this motion is whether the law concerning plaintiff's due process and first amendment rights in this factual context was clearly established

at the time of his suspension.

With respect to the first amendment claim, Bergna's claim of immunity is meritless. Plaintiff alleges that Bergna suspended him because of his political opinions, i.e. his candidacy for district attorney in opposition to a candidate Bergna endorsed. If this allegation is true, such action was as clearly a violation of plaintiff's first amendment rights in 1982 as it would be now. See Branti v. Finkel, 455 U.S. 507 (1980); Mt. Healthy City School Bd. of Ed. v. Doyle, 429 U.S. 274 (1977). Therefore Bergna's motion for summary judgment on the grounds of qualified immunity must be denied as to plaintiff's first amendment claim.

However, Bergna more plausibly argues that the applicable law on due process was unclear, and that Bergna thus

did not have notice that suspending plaintiff without prior notice and hearing was unlawful. The Supreme Court has recently adopted a more flexible balancing approach to the question of due process requirements for deprivation of various government benefits. See, e.g., Gross v. Lopez, 419 U.S. 565, 579 (1975). However, this development did not alter the basic principle that some form of hearing is required prior to the deprivation of a constitutionally protected property interest in employment, found to be long-settled law in Cleveland Bd. of Educ. v. Loudermill, 105 S.Ct. 1487, 1493 (1985).

Moreover, due process requirements in the context of deprivation of public employment were articulated in detail by the California Supreme Court, before 1982. That Court has held that, before

discharge from public employment, the employee must receive: notice of the proposed action and the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond. Skelly v. State Personnel Bd., 15 Cal.3d 194, 215, 124 Cal.Rptr. 14 (1975).

Bergna, however, contends that in the case of a suspension, as opposed to permanent discharge, a post-deprivation hearing appeared in 1982 to satisfy due process. The California Supreme Court in Civil Service Assn. v. City and County of San Francisco, 22 Cal.3d 552, considered procedural rights in the context of suspension, and found that the Skelly process was generally required, but that a post-deprivation hearing was adequate in the case of a short (five-day) suspension. Civil Service Assn., 22

Cal.3d at 562-63.

Bergna had served as a district attorney for 15 years, and had never before suspended an employee without prior notice and a hearing. It is arguable that the precise details of process due in the context of an indefinite suspension were left unclear by Skelly and Civil Service Assn. However, it is implausible that Bergna could not have known that his actions of summarily suspending plaintiff after informally receiving information from a few persons, and immediately publicizing this action, would violate settled principles of due process, especially in view of the potentially severe consequences to plaintiff's career and success in the upcoming election.

Bergna is in essence arguing that the qualified immunity defense should

apply whenever the application of case law to the specific fact situation at issue is unclear. This interpretation would improperly expand the scope of the doctrine. An official need not be certain that his conduct will be adjudged to violate statutory or constitutional rights, to have notice that he should refrain from engaging in it. There is a considerable difference between the case of an official who, in good faith, enforces a statute later found to be unconstitutional, and that of one who takes an action that is obviously irregular but which has not yet been found unlawful. This Court concludes that the defense of qualified immunity does not apply to Bergna's actions, and his motion for summary judgment on this basis must be denied.

Bergna also argues that the

qualified immunity doctrine applies to plaintiff's state law claims. We need not decide the general question whether state law claims are within the scope of this doctrine, because Bergna has failed to show that California law on invasion of privacy, and the Cal. Labor Code and Santa Clara County Charter, were not clearly established law in 1982.

California cases, interpreting the 1972 amendment to the California Constitution that established a right of privacy, have held that individuals have a right to be free of governmental disclosure of private information, absent a compelling state interest. White v. Davis, 13 Cal.3d 757, 773-74 (1975); Loder v. Municipal Court, 17 Cal.3d 859, 864 (1976). Bergna points out that the California Supreme Court has also held that this right of privacy does not

prevail over disclosures necessary to protect the public's right to a fair and impartial government. Loder, 17 Cal.3d at 864; County of Nevada v. MacMillen, 11 Cal.3d 662, 672 (1974). Bergna argues that he could not have known that his disclosure was not thus exempt from plaintiff's privacy claim.

However, Bergna does not allege facts showing either a compelling government interest in making the disclosure, or a public right to know of the suspension. At the time Bergna announced the suspension, he had only informal, unverified reports of plaintiff's improper conduct, and had not confronted plaintiff. The immediate disclosure of unsubstantiated charges is not so clearly mandated by governmental or public interest that Bergna could not know that it might invade plaintiff's

privacy. Therefore the qualified immunity defense does not apply, because the clearly established law in 1982 gave Bergna sufficient notice that his actions might violate plaintiff's privacy rights.

Similarly, although there were no cases to aid Bergna in interpreting the Cal. Labor Code and Santa Clara County Charter sections that plaintiff claims he violated, their substance and application is sufficiently clear. If, as plaintiff alleges, Bergna suspended him because of his political opinions, and to influence his political activities, then Bergna's actions violated Cal. Labor Code § 1102 and Santa Clara County Charter Art. VII, §§ 700 & 713. Bergna's qualified immunity argument with respect to these claims is meritless.

Statutory Immunity: Cal. Govt. Code § 802.2

Cal. Govt. Code § 820.2 grants state officials immunity for decisions involving exercise of their discretion, even if the discretion is abused. The California Supreme Court has interpreted this statute as only protecting "basic policy decisions" as opposed to merely ministerial or operational actions. Johnson v. State of California, 69 Cal.2d 782 (1968). The Johnson court explained that the purpose of the provision is to shield from judicial scrutiny and the threat of liability "those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." Id., 69 Cal.2d

at 794. The court held that a parole officer's decision concerning warnings to foster parents about a juvenile's record of violence was not a basic policy decision.

Cases following Johnson have further articulated the distinction between the policy planning and the operational levels of governmental decision-making. Sanborn v. Chronicle Pub. Co., 18 Cal.3d 406, 415 (1976); Toney v. State of California, 54 Cal.App.3d 779, 792 (1976). These cases have held that a city clerk's statement to the press about the unlawful actions of an insurance company manager, and state college officials' decisions on the timing and content of press releases about events on campus, were not discretionary acts under § 820.2

Following the California courts'

interpretation of § 820.2, this Court concludes that Bergna's decision to suspend plaintiff and hold a press conference, at the time and in the manner that he did, were operational decisions, as opposed to the policy-making or planning decisions shielded from liability by § 820.2. This statute is meant to preserve the independence of the broad goals and plans of state policy from judicial scrutiny, not to protect state officials from liability for misfeasance in carrying out their administrative, operational duties. Therefore, Bergna's motion for summary judgment on the basis of Cal. Govt. Code § 820.2 must be denied.

SANTA CLARA COUNTY'S MOTION FOR SUMMARY JUDGMENT

Santa Clara County moves for partial summary judgment on several of

plaintiff's claims. It argues that it cannot be held liable for deprivation of plaintiff's liberty interest in his professional reputation and employability, caused by the press conference announcing his suspension. The County claims, first, that the press conference was not held pursuant to county policy, and second, that plaintiff has failed to allege sufficient injury to his reputation and career. The County also argues that plaintiff's invasion of privacy claim fails because his suspension was a matter of public record, and because compelling state and public interests justified holding the conference. Finally, the County claims immunity from liability for violations of the County privacy ordinance and the County Charter.

Liberty Interest Claim

The County is not liable for the injury to plaintiff's liberty interests caused by the press conference, unless the conference was held pursuant to County policy. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 691 (1978). That is, the County cannot be held liable for Bergna's actions merely on the basis of respondeat superior. Id. The Supreme Court has recently clarified the kinds of governmental decisions that constitute policy, in Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986). The Court did not limit the scope of policy to formal rules and understandings followed consistently over time, but found that a single decision tailored to a particular situation could also be policy. Pembaur, 106 S.Ct. at 1298-99. However, the Court

went on to say that:

> not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority with respect to the action ordered. The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.
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> * * *
>
> . . . We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Pembaur, 106 S.Ct. at 1299-300.

Applying the Pembaur rule to the undisputed facts in this case, this Court concludes that the press conference was

not held pursuant to County policy. The decision to hold it may have been within Bergna's discretion, but he was not responsible for establishing County policy on publicizing employee discipline.

The participation of Assistant County Executive Batchelor and County Executive Reed does not raise Bergna's actions to the level of county policy, since under County Charter, Article VII, the Board of Supervisors alone is responsible for setting policy on employee discipline. Moreover, the fact that the Board of Supervisors later issued its own press release expressing general support for Bergna's actions did not transform his discretionary action into County policy. The Board of Supervisors does not have an affirmative duty to prevent or disavow the

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constitutional violations of its employees, in order to escape liability for them. Krisko v. Oswald, 655 F.Supp. 147, 152 (E.D.Pa. 1987); see also Rizzo v. Goode, 423 U.S. 362 (1976).

Therefore, since the press conference allegedly infringing plaintiff's liberty interest was not County policy but the discretionary act of an individual official, Santa Clara County's motion for summary judgment on plaintiff's liberty interest claim is granted.

Invasion of Privacy Claim

Santa Clara County argues that plaintiff fails to state a claim for invasion of privacy because the information disclosed at the press conference was not private, but a matter of public record. It alleges that disciplinary actions against county

employees are filed with the Personnel Board, whose records are public. Plaintiff responds that the press conference disclosed information not yet filed with the Board, and that there was a county policy of not disclosing matters currently under investigation. Also, plaintiff argues that even if the fact of his suspension was public, Bergna's accompanying statements and opinions expressed at the conference violated his right of privacy.

It appears that triable issues of fact remain, as to the extent of Bergna's disclosure and the County's rules or customs concerning confidentiality of employee discipline and personnel records. Without clarifying these facts, it is impossible to determine whether plaintiff had a privacy interest in the information disclosed, and to balance

this interest against the County's claims of compelling governmental and public interests in disclosure. Therefore this is not an appropriate ground for summary judgment.

The County also argues that it is immune from liability for violations of the County privacy ordinance, under Cal. Govt. Code § 815. However, as plaintiff points out, Cal. Govt. Code § 815.2 provides that a public entity such as the County is liable for injuries caused by its employees' acts, so long as the acts would also give rise to a claim against the employee, and the employee is not immune from liability. This Court has determined that plaintiff has stated a claim against Bergna, and that Bergna is not immune under § 820.2, so § 815.2 applies. Therefore, the County's motion for summary judgment on the privacy claim

must be denied, since it is not immune from liability and essential facts relevant to plaintiff's privacy interest are in dispute.

County Charter, Article VII, §§ 700 & 713

Santa Clara County moves for summary judgment on these claims on the grounds that these provisions do not create a cause of action for damages, and that the County is immune from liability under Cal. Govt. Code § 815. The immunity argument fails, for the reasons set forth above: § 815.2 imposes respondeat superior liability on the county for Bergna's actions.

The County's other contention, that §§ 700 and 713 do not provide a right of action for damages, is also meritless. The California Constitution, Article II, § 3, provides that charter provisions are

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the law of the state and have the force and effect of legislative enactments. The Charter provisions, which give rise to criminal liability under Article VIII, § 800 of the Charter, also create a civil cause of action by a plaintiff who belongs to the class the provision is meant to protect. See Montalvo v. Zamora, 7 Cal.App.3d 69, 74 (1970); Witkin, Summary of California Law (8th Ed. 1974), Torts, § 7, p. 2307. Moreover, the cases the County cites for the proposition that charter provisions only give rise to suits in equity, not to actions for damages, do not so hold. They are merely cases in which plaintiffs sought injunctive relief. Therefore, plaintiff has stated a claim under the Charter provisions, and the County is not immune from liability, so summary judgment must be denied.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that:

1. Defendant Bergna's motion for summary judgment is DENIED.

2. Defendant Santa Clara County's motion for partial summary judgment is DENIED, as to all causes of action except plaintiff's liberty interest claim.

3. Plaintiff's due process claim for deprivation of his liberty interest in his reputation and career, against defendant Santa Clara County, is DISMISSED with prejudice.

IT IS SO ORDERED.

Dated: October 14, 1987

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIUS L. FINKELSTEIN,	)	
Plaintiff,	)	No. C 83 5125 TEH
v.	)	C 84 1391 TEH
LOUIS P. BERGNA, et al.,	)	ORDER
Defendants.	)	

This matter comes before the Court on separate motions for summary judgment by defendants Bergna and Santa Clara County. For the reasons stated below, the Court grants these motions in part and denies them in part.

Facts

When considering a motion for summary judgment, a court must construe

the facts of the case in the light most favorable to the party opposing summary judgment. United States v. Diebold, 369 U.S. 654, 655 (1977). The following recitation of facts mainly relates those events about which there is no dispute; where the parties have advanced differing versions of events, however, the Court has accepted plaintiff's contentions as correct for purposes of this motion.

This controversy stems from events which occurred during the hotly contested election in 1982 for District Attorney of Santa Clara County. Defendant Bergna, after serving 15 years as District Attorney, had decided not to seek reelection. Two deputy district attorneys, plaintiff Finkelstein and Leo Himmelsbach, emerged as the top candidates to succeed Bergna and finished only 1300 votes apart in the June

primary.

Bergna was a clear supporter of Himmelsbach. He served as an honorary chair of Himmelsbach's campaign, made a public speech favorably comparing Himmelsbach to Finkelstein, contributed at least $485 to Himmelsbach's efforts, and his name appeared on some of Himmelsbach's campaign literature.

In 1981, Himmelsbach sent a letter to the other attorneys in the office asking for their financial and political support. In February, 1982, plaintiff alerted the state Attorney General about Himmelsbach's solicitation. After conducting an investigation, the Attorney General concluded Himmelsbach had violated Cal.Gov.Code § 3205 which prohibits public employees from soliciting campaign contributions from other public employees. Defendant Bergna

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took no disciplinary action against Himmelsbach for this violation, nor did he issue a press release or call a press conference.

In the spring of 1982, plaintiff was working late in the district attorney's office with two of his supporters, including deputy district attorney Lane Liroff. While preparing information for submission to the League of Women Voters, plaintiff and Liroff went into a "hallway" or "alcove" between two secretaries' desks to search for a copy of his employment application. Defendant Bergna claims plaintiff had no legitimate business being in this "hallway" at that hour of the evening was thus in an "unauthorized" area. Plaintiff asserts there is no visible indication or known office policy making this area off limits. While in this area, Liroff may

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have taken the opportunity to look through the applications and resumes of others in the office. Plaintiff claims his own activity was limited to finding and reviewing his own resume.

On Friday, October 15, Bergna received a phone call from a reporter who stated he had in his possession a copy of a letter written by Bergna in 1974 which reprimanded Himmelsbach for his poor judgment in an incident involving the disposal of stolen property. Bergna asked how the reporter had obtained the report, but the reporter would not identify his source. Bergna recalls the reporter saying the report came from the "personnel files" of the district attorney's office.

The story of Bergna's reprimand of Himmelsbach appeared in the newspaper on the following day, Saturday, October 16.

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That morning, Bergna went to a campaign meeting attended by Himmelsbach and others. One of the topics alluded to -- albeit briefly -- was how best to handle the public disclosure of the reprimand.

Bergna received a call that same day from Terry Briggs, another deputy district attorney in his office. Briggs told Bergna that Liroff had mentioned to her months ago that he and Finkelstein had stayed late after work and read the personnel files of various employees. In the course of this conversation, Liroff had mentioned that there were "inane" comments on several of the resumes, including Briggs' own. Briggs had reviewed her personnel file and had observed a comment similar to the one Liroff had reported. Briggs told Bergna that she felt terrible about relating this conversation she had with her

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friend, but in light of the article that had appeared in the paper that day she felt she had to tell Bergna. At Bergna's request, Briggs prepared a letter summarizing what she had told him.

Shortly after speaking with Briggs, Bergna called the Attorney General's office and asked that they initiate an investigation. They agreed to conduct an inquiry.

Early that next week, Bergna examined the personnel files of those persons on whose resumes the "inane" comments were allegedly written. He found a comment written on Briggs' resume, but not on the resumes of the other attorneys.

On Friday, October 22, Bergna interviewed Liroff who denied having told Briggs that he and Finkelstein had gone through personnel records of other

employees.

That same afternoon, Bergna met with Assistant County Executive Batchelor to discuss possible disciplinary actions against Finkelstein and Liroff. Batchelor cautioned Bergna against firing Liroff and Finkelstein, but did tell Bergna he had the power to suspend his subordinates for up to 30 days without pay.

On Saturday morning, October 23, two investigators from the Attorney General's office visited plaintiff at his home to discuss the incident. Finkelstein claims this is the first time anyone contacted him relevant to this incident. As he was feeling ill at the time, plaintiff agreed to meet with the investigators at 11:00 a.m. on Monday morning.

At 7:15 a.m. Monday, October 25, two investigators called on plaintiff at his

home. He informed them he would meet with them at 11:00 a.m. at the office as previously agreed. He then called the office, told the calendaring secretary he was ill, and asked to have another lawyer cover a hearing set for 9:00 a.m.

Defendant Bergna knew that plaintiff had not wanted to talk with the investigators over the weekend and had promised to meet them on Monday morning. When he learned plaintiff had phoned in ill on Monday, Bergna decided this was corroboration of plaintiff's involvement in the incident. As a result, Bergna issued a notice of suspension that morning and held a press conference that afternoon to announce the suspension. This was the first time in his fifteen years as District Attorney that Bergna had disciplined an employee without speaking with him and the first time he

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had held a press conference to announce the results of a personnel decision.

At 10:30 a.m. Monday, plaintiff received the notice stating he was "on Administrative Leave from the time of this notice." Finkelstein decided not to go to the office to meet with the investigators; he telephoned his receptionist and told her to tell the investigators that he would meet with them at his home. The following morning, he met with the investigators.

On November 1, the day before the election, the Board of Supervisors passed a resolution supporting Bergna's decision to suspend Finkelstein and Liroff.

On November 2, Leo Himmelsbach was elected District Attorney of Santa Clara County.

On December 1, the Attorney General's office issued a report which

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stated that there was "no evidence" to support a conclusion that someone gained access to the official personnel files and that it was "impossible" to determine who leaked the letter of reprimand to the press.

On December 30, more than two months after the start of plaintiff's "administrative leave," Bergna sent a letter to Finkelstein's attorney notifying him of the decision to suspend plaintiff for 30 days. Plaintiff has appealed this decision, but there has not yet been any final administrative ruling.

I. Bergna's Motion for Summary Judgment

Defendant Bergna has moved for summary judgment on plaintiff's claims of deprivation of his property interest in employment without due process of law, deprivation of his liberty interest

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without due process, denial of his First Amendment rights, and common law defamation. The Court will consider each of these claims in turn.

A. Deprivation of Property Without Due Process

Plaintiff alleges that Bergna's decision to suspend him denied him of his property interest in employment without due process. Defendant claims that no property interest was deprived since plaintiff was only suspended and not terminated. Defendant also asserts he afforded plaintiff due process in reaching a decision to suspend him.

Determination of whether a property interest was involved depends on interpretation of California law. Property interests are "created and their dimensions are defined by existing rules and understandings that stem from an

independent source such as state law. . . ." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Under California law, "[i]f an employee is subject to discharge only for cause, he has a property interest which is entitled to constitutional protection." Davis v. Civil Service Commission, 93 Cal.App. 417, 420, 155 Cal.Rptr. 660 (1979). Plaintiff has alleged that sections A25-300 and A25-301 of the Santa Clara County Code provide he may be suspended, demoted or dismissed only for cause. As defendant has not alleged any facts to refute this contention, he is not entitled to summary judgment on the grounds that plaintiff did not have a property interest in uninterrupted employment.

Defendant also argues that he followed constitutionally adequate

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procedures when suspending plaintiff. The courts have long recognized that the nature of the process "due" depends on the circumstances of the case and is determined by balancing the competing interests at stake, Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In public employment cases, these interests are (1) plaintiff's interest in retaining his position of employment, (2) defendants' governmental interest in expeditious discipline of unsatisfactory employees and in avoidance of administrative burdens, and (3) the risk of erroneous deprivation. Cleveland Board of Education v. Loudermill, ___ U.S. ____, 105 S.Ct. 1487, 1494 (1985), See Mathews, 425 U.S. at 335.

In Loudermill, the Court concluded that pre-deprivation procedures in public employment cases need not definitively

resolve the propriety of the employer's action. 105 S.Ct. at 1494. A deprivation of property, however, must be preceeded [sic] by notice and an opportunity for hearing appropriate to the nature of the case. Id. at 1493. If a reasonably prompt post-deprivation evidentiary hearing is available, due process requires that the employee be afforded notice of the charges, an explanation of the employer's evidence, and an opportunity to present his own explanation of events prior to the deprivation. Id. at 1494.

Neither party has fully briefed the Court concerning the details of the administrative appeals process available to plaintiff. Even assuming, arguendo, that plaintiff was entitled to a reasonably prompt post-deprivation evidentiary hearing, defendant has failed

to show there are no genuine issues of material fact concerning the adequacy of the pre-deprivation process.

Application of the factors identified in Loudermill compels this conclusion. In so doing, the Court must construe the facts in the light most favorable to plaintiff. Diebold, supra. Plaintiff's interest lay in not being suspended. This is is [sic] concededly a less important interest than courts ordinarily confront in employment cases (i.e., termination), but plaintiff still faced the prospect of being without income for an indefinite period of time.

Against this interest, the Court must balance the defendant's need to take expeditious action and the risk of erroneous deprivation. Defendant has conceded that an ordinary personnel investigation can last several months

prior to administrative action being taken. Defendant's need to act quickly was thus apparently compelled in large part by the upcoming election. The Court recognizes that officers of government have a strong interest in protecting the integrity of their offices, but defendant has not offered any explanation of how "expeditious" suspension of plaintiff advanced this governmental interest. all government employers have an interest in expeditious disciplining of unsatisfactory employees, but Loudermill establishes that, in most instances, an employee must learn of the charges against him and have opportunity to respond before being deprived of his property. 105 S.Ct at 1494. In this case, plaintiff claims he received neither notice nor an opportunity to present his version of events before he

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was placed on leave.

Furthermore, defendant's decision to suspend plaintiff without talking to him appears to have entailed a significant risk of erroneous deprivation. According to plaintiff, defendant decided to suspend plaintiff because he thought plaintiff had examined the "official" personnel files of the District Attorney's office and suspected him of leaking the confidential Himmelsbach memo to the press. As defendant had no direct evidence on October 25 that either of these conclusions were true, his decision to suspend plaintiff without providing plaintiff with an opportunity to be heard increased the risk that the deprivation would be erroneous. In light of the above analysis, the Court finds defendant has failed to show there are no issues of genuine fact concerning the adequacy of

the pre-deprivation procedures he followed.

Defendant further asserts in Parratt v. Taylor, 451 U.S. 527 (1981), establishes that an adequate post-deprivation remedy can cure pre-deprivation procedural defects. The Court rejects this assertion. Parratt stands only for the proposition that a deprivation of property does not constitute a deprivation of due process if it is impracticable for the state to provide proceduraly [sic] adequate pre-deprivation process because the deprivation was random and unauthorized. Mann v. City of Tucson, No. 85-1847, slip. op. at 7 (9th Cir. March 24, 1986). In this situation, defendant clearly had the ability to provide a hearing in advance of the suspension. Parratt is thus inapplicable.

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Defendant also claims he is entitled to summary judgment on the procedural due process claim under a theory of good faith immunity. "[G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Neither party has fully briefed what the "clearly established" law was in the fall of 1982. The clearest statement on the law did not come until 1985 with Loudermill, but for purposes of claiming immunity, government officials are not expected to be able to "predict[] the future course of constitutional law." Pierson v. Ray, 386 U.S. 547, 557 (1967). The Court notes, however, that the

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Supreme Court stated in 1971 that the "root requirement" of the Due Process Clause was "that an individual be given an opportunity for hearing before he is deprived of any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Given this language, and without further briefing from the parties, the Court finds defendant has failed to show his conduct did not violate clearly established constitutional rights.

Defendant asserts he reasonably relied on the advice of county personnel officials in suspending plaintiff without notice or hearing. However, the Court notes that the question of immunity turns on the objective reasonableness of defendant's behavior in light of established law, not on his subjective good faith. Lowe v. City of Monrovia,

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775 F.2d 998 (9th Cir. 1985).

In light of the discussion above, the Court hereby denies defendant Bergna's motion for summary judgment on the cause of action for deprivation of property without due process of law. The Court makes this ruling without prejudice to defendant's renewal of a motion for summary judgment on grounds of immunity if defendant can show the "clearly established" law at the time of the suspension would not have alerted a reasonable person in defendant's position to the fact he was violating plaintiff's constitutional rights to procedural due process.

B. Deprivation of Liberty Without Due Process

Defendant Bergna has also moved for summary judgment on plaintiff's claim that defendants deprived him of his

liberty interest in his reputation without due process of law. The Ninth Circuit has recently articulated the standards applicable to this type of claim:

> [An] interest in liberty is . . . implicated if a charge impairs [plaintiff's] reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment or the alteration of some right or status recognized by state law. Vanelli v. Reynolds School District, 667 F.2d 773, 778 (1982) (citations omitted).

Defendant does not suggest that the charge was not made public or did not impair plaintiff's reputation for honesty. Citing Colazzi v. Walker, 542 F.2d 969 (7th Cir. 1976), however, defendant claims no procedural right is implicated unless an individual is denied

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present or future employment in connection with the stigmatizing accusation. The plain language of Vanelli, supra, makes clear that a change in employment status, combined with a stigmatizing statement, is sufficient to invoke procedural due process protections.

Defendant also suggests that the charge was not false. The charge levied by defendant both in his notice of administrative leave and in the press release of October 25 was that plaintiff had gained unauthorized access to "the personnel files of other employees." Plaintiff contends, however, that he only examined his own job application and did this in an area of the office which did not contain the "official" personnel files. This contention raises an issue of material fact concerning the truth of

the charge and thus defeats defendant's motion for summary judgment on this ground.

Defendant also asserts that the availability of the post-deprivation hearing afforded plaintiff adequate procedural protections for his liberty interest. The Court rejects this assertion for the same reasons advanced above concerning the property interest.

Defendant further claims he is entitled to immunity for any procedural violations he may have committed with respect to plaintiff's liberty interests. Once again, the parties have not fully briefed what the state of the law was at the time of suspension. The Court has already held that defendant is not entitled to summary judgment on immunity grounds for his decisions on the pre-deprivation procedural requirements. As

the Court finds that several Supreme Court decisions had clearly established plaintiff's liberty interest in his reputation, see e.g. Roth, supra, Paul v. Davis, 424 U.S. 693 (1976), the Court hereby denies defendant's motion for summary judgment on this claim on immunity grounds. This denial is made without prejudice against renewal if defendant can show the law was not clearly established at the time of the suspension.

C. Plaintiff's First Amendment Claim

Defendant Bergna has also moved for summary judgment on plaintiff's claim of a First Amendment violation. The First Amendment prohibits the discharge, suspension or harassment of public employees for political reasons. Branti v. Finkel, 445 U.S. 507 (1980). To

establish this cause of action, plaintiff must show (1) the activity complained of (running for office) qualified as a protected activity and (2) the activity was a "motivating" or "but for" cause of his suspension. Mt. Healthy City School Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977).

Defendant asserts "there are no facts whatsoever which demonstrate the 'but for' requirement has been met in the instant case." He points out the Attorney General's report suggests plaintiff was in an "unauthorized area" of the office and thus was properly subject to discipline. The court does not agree with this analysis. Despite the conclusion by the Attorney General, these facts, by themselves, fail to establish that there are no genuine issues of material fact concerning

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Bergna's alleged political motivations in suspending plaintiff.

In analyzing this issue, the court once again must construe the facts in a fashion most favorable to plaintiff. When viewed in this light, several facts imply plaintiff's political activity may have been "but for" causes of the decision to suspend him. Bergna has acknowledged he had never before suspended an employee without first talking with the employee. Bergna also stated that investigations into alleged employee misbehavior can take as long as six months, but the fact the election was approaching was "one factor" which motivated him to act quickly. Bergna further acknowledged that he met with Himmelsbach the day after the article came out and discussed -- albeit briefly -- what should be done in response.

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These facts, when construed in favor of plaintiff, suggest that political motivations may have played a part in Bergna's decision to suspend plaintiff.

The Court wishes to emphasize it is not implying that it believes Bergna definitely was motivated by political considerations. On the basis of the record before it, however, the Court cannot conclude there are no genuine issues of material fact on this portion of the dispute. Therefore, defendant Bergna's motion for summary judgment is denied.

D. Defamation

Plaintiff also alleges Bergna defamed him in three statements issued on October 25, 1982. Defendant responds by claiming he is entitled to either absolute or good faith immunity for these statements. Defendant also argues

plaintiff can not demonstrate Bergna issued these statements with "constitutional malice" as required under New York Times v. Sullivan, 376 U.S. 254 (1964). For the reasons stated below, the court grants defendant's motion for summary judgment on this claim.

As a candidate for public office, plaintiff was clearly a "public figure" at the time of the alleged defamation. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Since Bergna's published statements about plaintiff involved matters of "public concern" -- i.e., a candidate's honesty and integrity -- plaintiff must prove defendant acted with "actual malice." Dun & Bradstreet Inc. v. Greenmoss, 105 S.Ct. 2939, 2945 (1985), Gertz, supra. Actual malice is not merely ill will; it is the making of a statement with knowledge of its

falsity, or with reckless disregard of whether it is true. Gertz, supra, 418 U.S. at 328. The test is a subjective one, for as the Supreme Court has stated:

> Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added).

In recognition of the difficulty of proving actual malice, the Supreme Court has held that a defendant can rely on either direct or inferential evidence of a defendant's knowledge or recklessness. Id. at 732.

The law is not as clear, however, on the standard courts should apply when analyzing evidence of actual malice on motions for summary judgment by libel

defendants. To prevail at trial, the public figure plaintiff must not only prove the existence of actual malice, he or she must do so with "convincing clarity," Sullivan, supra, 376 U.S. at 495-86, or "with clear and convincing proof." Gertz, supra, 410 U.S. at 342. In applying this standard, at least one circuit court has held that to deny a defendant's motion for summary judgment, a judge must conclude that a reasonable jury could find malice with convincing clarity. Yiamouyiannis v. Consumers Union, 619 F.2d 932, 940 (2d. Cir 1980). Another court of appeals has held that imposing this heightened proof requirement on libel plaintiffs at this early stage of proceedings is inappropriate; this court required plaintiffs to prove only that a genuine issue of material fact existed on the

question of actual malice. Liberty Lobby v. Anderson, 746 F.2d 1563 (D.C.Cir. 1985). The Supreme Court granted certiorari on this latter case and heard oral argument last December. To date, the Court has not issued an opinion.

This Court finds it need not endorse either perspective to resolve the dispute before it. Even adopting the standard of review most favorable to plaintiff -- the Liberty Lobby approach -- the Court holds there are no genuine issues of material fact demonstrating defendant's actual malice.

Plaintiff has uncovered no direct evidence that defendant thought his statements might be false, or had serious doubts about their truth at the time he made them. Plaintiff relies instead upon inferential evidence to support his claim of actual malice. While the use of this

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form of evidence is entirely appropriate, St. Amant, supra, the Court is not persuaded by plaintiff's arguments about the import of the evidence.

Plaintiff cites several examples of defendant's behavior from which he suggests a jury would be able to infer defendant's actual malice. First, he argues that defendant's alleged failure to speak to plaintiff before suspending him suggests defendant acted with reckless disregard for the truth. Even after construing this evidence in the light most favorable to plaintiff, the Court does not agree with plaintiff's analysis. The failure to conduct an exhaustive and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that issue. See St. Amant, supra, 390 U.S. at 733,

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Beckley Newspapers v. Hanks, 389 U.S. 81, 84-85 (1967). Bergna did conduct some investigation; he had spoken with both Briggs and Liroff about the incident. His decision to suspend plaintiff without speaking to him does not raise a genuine issue of material fact about defendant's recklessness with regard to the truth.

Plaintiff also argues defendant ignored warnings from his Chief Assistant Attorney about inaccuracies in the published statements. Even under plaintiff's account, however, these warnings came after defendant had conducted the press conference and published the three written statements which the First Amended Complaint identifies as the defamatory documents. (See F.A.C.¶'s 48, 49). Therefore, these warnings are irrelevant to defendant's state of mind at the time of publication.

Similarly, plaintiff's argument about the unexplained appearance of certain copies of a resume in an employee's file concerns matters occurring after the issuance of the statements and are not relevant to determining defendant's state of mind at the time of publication.

Plaintiff further asserts defendant "fabricated" the allegations against him without evidentiary support. To corroborate this assertion, plaintiff puts forth two newsparper [sic] articles written shortly after the suspension; in each of these articles, defendant is quoted as saying he has "no evidence" that plaintiff went into the personnel files. (See Deposition of Bergna, vol. III, p.314-325, Deposition of Norman, p.125, and related exhibits.) Defendant does not claim that, at the time he made the allegedly defamatory statements, he

had direct evidence of plaintiff's intrusion into the personnel files. Defendant claims only that Brigg's account of Liroff's comments to her, when combined with plaintiff's "apparent" refusal to talk with investigators from the Attorney General's office, persuaded him that plaintiff had gone into the personnel files. The Court finds the newspaper articles -- even when combined with the evidence discussed above -- do not raise a genuine issue concerning defendant's subjective belief in plaintiff's culpability.

After reviewing carefully all of the evidence marshalled by plaintiff, the Court finds that he has neither shown there are material facts in dispute concerning defendant's knowledge of the falsity of the three statements published on October 25, 1982, nor raised genuine

issues concerning whether defendant had "serious doubts" about the accuracy of the publications. Plaintiff may argue this holding is inconsistent with the Court's ruling above that political consideration may have influenced defendant's decision to suspend plaintiff. However, defendant's motivation for suspending plaintiff so quickly is a separate question from whether defendant believed plaintiff had committed the acts of which he was accused. For these reasons, the Court grants defendant Bergna's motion for summary judgment on the claim of defamation.

II. Santa Clara County's Motion for Summary Judgment

Defendant Santa Clara County has also moved the court for summary judgment on all of the allegations of the

complaint. Plaintiff responds by asserting this motion is unwarranted in light of Judge William's denial of this same motion in August 1985. As the Supreme Court in Pembaur v. Cincinnati, 105 S.Ct. 1292 (1986), recently clarified the law regarding municipal liability under § 1983 for the acts of its employees, the Court believes re-analysis of this claim is appropriate. Furthermore, as plaintiff's defamation claim against the County is based on a theory of respondeat superior for Bergna's acts, the Court's decision today to grant Bergna's motion for summary judgment on this claim demands a grant of summary judgment for the County as well. However, as no new circumstances or evidence have emerged on the remaining claims, the court will not "reconsider" Judge Williams' ruling on these claims.

A. Section 1983 Claims

The Complaint asserts the County is liable under § 1983 for depriving plaintiff of his property and liberty interests and for depriving him of his First Amendment rights. The County has moved for summary judgment on all of these claims. For the reasons stated below, the Court grants summary judgment on the First Amendment claim and denies it on the due process claims.

Plaintiff has advanced two theories of municipal liability. First, plaintiff asserts each of these deprivations stemmed from a discretionary employment decision made by an elected official and thus represents the official policy of the County. Pembaur suggests plaintiff is mistaken in this analysis.

"Congress did not intend municipalities to be held liable [under

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§ 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monnell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978). Municipalities are only liable for acts of employees if these actions themselves constituted "official policy or custom"; courts will not impose liability simply on the basis of respondeat superior. Since Monnell, the courts have struggled to define the circumstances in which an action by a municipal employee rose to the level of policy or custom. Pembaur is the latest pronouncement by the Supreme Court on this topic.

Plaintiff argues that since defendant Bergna was the head of the District Attorney's office and was responsible for making all discretionary employment decisions, his decision to

suspend plaintiff represented official policy. Justice Brennan, speaking for four members of the Court in Pembaur[1], rejected this theory of municipal liability:

> Thus, for example the County Sheriff may have the discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis

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[1]Although this portion of the opinion was not joined by a majority of the Court, the other justices dissented or declined to join because they thought Justice Brennan's language expanded municipal liability too broadly. Thus to the extent plaintiff's theory of liability is "broader" than Justice Brennan's, it finds no support on the current Court.

> for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decision would represent county policy and could give rise to municipal liability. 106 S.Ct. at 1301, fn.12.

Thus, the mere fact that defendant Bergna had complete discretion in deciding to suspend plaintiff does not make his decision a reflection of official policy. Even if he "exercised that discretion in an unconstitutional manner," as plaintiff suggests he did in suspending plaintiff without notice or hearing, this allegedly unlawful behavior would not impose liability upon Santa Clara County. Id.

Plaintiff further argues his

suspension without notice was pursuant to official county policy by virtue of Santa Clara County Code Section A25-303(a) which reads, "Disciplinary actions may be taken without prior notice where, in the opinion of the appointing authority, the action of the employee makes such action necessary." The Court agrees the County has failed to demonstrate that this code section does not provide the necessary link between Bergna's decision to suspend plaintiff and the makers of Santa Clara County's official employment policies.

Plaintiff asserts, and defendants do not dispute, this code section reflects the official employment policy of the County as adopted by the Board of Supervisors. "(I)t is when the execution of a government's policy or custom . . . inflicts the injury that the government as an entity is liable under § 1983."

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Monnell, 436 U.S. at 694. In choosing to suspend plaintiff without notice or hearing, Bergna was apparently following an officially endorsed course of action; in fact, plaintiff alleges Bergna consulted with the chief executive office of the County before taking this action. To the extent Bergna violated plaintiff's rights to due process, the County has failed to show there are no issues of fact concerning its liability for these acts.

However, analysis of plaintiff's First Amendment claim compels a different conclusion. To prove a violation of his First Amendment rights, plaintiff must show Bergna was motivated by a desire to restrict plaintiff's political activity. Mt. Healthy, supra. Plaintiff does not suggest this alleged intent to trammel his freedom of activity reflected any

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official policy or custom of the County. Rather, plaintiff's theory of the case is that Bergna was pursuing his own political agenda. To impute Bergna's alleged motivation to the County and impose liability on the County that basis would impermissibly extend the theory of respondeat superior to § 1983. Therefore, the Court grants the County's motion for summary judgment on this claim.

III. Conclusion

For the reasons stated above, and good cause appearing, it is hereby ORDERED that:

1. Defendant Bergna's motion for summary judgment on the defamation claim is GRANTED; and

2. Defendant Bergna's motion for summary judgment on all other claims is DENIED; and

3. Defendant Santa Clara County's motion for summary judgment on the defamation cause of action and for the § 1983 claim stemming from the alleged deprivation of plaintiff's First Amendment rights is GRANTED; and

4. Defendant Santa Clara County's motion for summary judgment on all other claims is DENIED; and

5. The parties shall appear in Courtroom 11, 450 Golden Gate Avenue, at 8:30 a.m. on Thursday, August 7, 1986 for a status conference. At least ten days prior to that date the parties shall file status conference certificates with this Court and shall include all the information listed in Local Rule 235-3.

IT IS SO ORDERED.

Dated: June 23, 1986

THELTON E. HENDERSON
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JUL 11 1991
OFFICE OF THE CLERK

No. 90-1895

In The

Supreme Court of the United States

October Term, 1990

LOUIS P. BERGNA,

Petitioner,

v.

JULIUS L. FINKELSTEIN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

In an action for damages by a public employee against his employer, a public official, for deprivation of property and liberty without due process of law, based on the public official's suspension of the employee without notice or prior hearing and on the public disclosure of the suspension and accusations of wrongful conduct, was the Ninth Circuit correct in determining that the public official was not entitled to qualified immunity in that his conduct violated clearly established law?

PARTIES TO THE PROCEEDINGS BELOW

Respondent concurs with Petitioner's statement identifying the parties to the proceedings below.

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R. Stern, E. Gressman and S. Shapiro,
Supreme Court Practice 8, 10, 17

No. 90-1895

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

LOUIS P. BERGNA, *Petitioner*,
v.
JULIUS L. FINKELSTEIN, *Respondent*.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Julius L. Finkelstein respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. That opinion is reported at 924 F.2d 1449 and is set forth in the Appendix at 1a to 22a.

JURISDICTIONAL GROUNDS

Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). Respondent does not dispute that the Petition is timely.

OPINIONS BELOW

Respondent concurs with Petitioner's statement regarding the opinions below, and incorporates by reference Petitioner's Appendix, which includes such opinions. The Ninth Circuit's final decision below (following withdrawal and modification of its initial decision) is reported at 924 F.2d 1449.

RELEVANT STATUTORY PROVISIONS

Respondent adopts Petitioner's statement of relevant statutory provisions.

STATEMENT OF THE CASE

Relevant Factual Background

In 1982 Respondent Julius L. Finkelstein was a Deputy District Attorney for Santa Clara County, California. He worked for Petitioner Louis P. Bergna, then the elected District Attorney for Santa Clara County. Petitioner did not seek reelection in 1982. Respondent and Leo Himmelsbach ("Himmelsbach"), an Assistant District Attorney who also worked for Petitioner, ran against each other for Petitioner's position. Petitioner supported Himmelsbach and was honorary chairman of his campaign committee.

Shortly before the election, the press received information implicating Himmelsbach in improper conduct while an Assistant District Attorney. On October 25, 1982, eight days before the election, without prior notice or hearing, Petitioner suspended Respondent without pay, issued a press release and held a press

conference to announce the suspension. Respondent was suspended pending investigation for allegedly improperly "leaking" derogatory information regarding Himmelsbach. Respondent was suspended for 69 days, 30 of which were without pay. He lost the election. Although the state Attorney General's office eventually concluded that there was no evidence to support any allegation that Respondent had leaked the information, stories accusing Respondent of criminal wrongdoing and other unlawful and unethical conduct as a prosecutor and a lawyer appeared on television and in the press after the suspension.

Procedural History

Respondent initiated suit in October 1983, alleging, *inter alia*, under 42 U.S.C. § 1983, that by suspending him without prior notice or hearing, and announcing his suspension to the press, Petitioner deprived him of property and liberty interests associated

with his public employment, in violation of his federal constitutional right to due process. Petitioner asserted a defense of qualified immunity and moved for summary judgment on that basis. The District Court denied his motion.

Petitioner then appealed the denial of summary judgment to the Ninth Circuit, invoking that court's jurisdiction under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 524-530, 86 L.Ed.2d 411 (1985). In its final opinion and order the Ninth Circuit affirmed the denial of Petitioner's motion for summary Judgment on qualified immunity grounds as to Respondent's property and liberty interest claims. Applying *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982), *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523 (1987), and *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976), the Ninth Circuit upheld the District Court's determination that Petitioner had violated "clearly established law"

with respect to the deprivations of Respondent's property and liberty interests, rejecting Petitioner's claim that the distinction between suspension and termination was dispositive and that post-deprivation process afforded Petitioner was sufficient. 924 F.2d at 1451-1452, Appendix at 7a-8a.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner devotes fully three-fourths of his argument why the petition should be granted to a lament that the Ninth Circuit adopted an "erroneous approach" and failed to engage in the "particularized" immunity analysis adopted by this Court in *Anderson v. Creighton*, 483 U.S. 635 (1987). Petitioner thus attempts to elevate a claimed lack of analytic rigor into a "conflict" with this Court's authority. Petitioner then cites what he deems more "particularized" "detailed" and "careful" decisions of

other Circuits as establishing a "conflict" between the Ninth Circuit and those other Circuits. Having focused, throughout, on the highly "particularized" circumstances of his own immunity claim, Petitioner is then at a loss, not surprisingly, to argue that an important and recurring legal question is presented for this Court's review.

As demonstrated below, Petitioner has met none of the settled criteria for granting a petition for writ of certiorari. The Ninth Circuit's holding and analysis in fact are sound and correct and fully consistent with the applicable authority of this Court. Nothing in the Ninth's Circuit's analysis or holding conflicts with the law of other Circuits. Finally, because the Ninth Circuit's decision arises in the context of the narrow facts before it, which are unlikely to recur, the Petition fails to raise an important federal question meriting this Court's review.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT HAS NOT RENDERED A DECISION THAT IS IN CONFLICT OR INCONSISTENT WITH THE CONTROLLING AUTHORITY OF THIS COURT

Under Rule 17.1(c) one consideration governing review on certiorari is whether the federal court of appeals decision conflicts with applicable decisions of this Court on a federal question. However, because "[l]awyers . . . are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine[,] . . . the conflict must be direct and must be readily apparent from the lower court's rationale or result." R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, § 4.5 at 203 (6th Edition, 1986). *No* conflict, much less a direct or apparent conflict, exists in this case.

Petitioner argues that the Ninth Circuit decision below conflicts with *Anderson v. Creighton*, 483 U.S. 635,

because it "fails to follow the teaching" of that case "with respect to the method for determining whether official conduct was in violation of 'clearly established law' and therefore outside the protection of qualified immunity." Petition at 17. Petitioner complains, in essence, that the Ninth Circuit applied the "clearly established law" test for granting qualified immunity without the requisite degree of "particularity" called for by this Court in *Anderson*, and that a conflict thereby is established. Petition at 17-18. He thus contends that the Court below adopted an "erroneous approach" (Petition at 17), "framed its inquiry too broadly" (Petition at 29) and defined Respondent's due process claims "abstractly and only in general terms" (Petition at 22).

In reality, Petitioner's purported "conflict" claim is nothing more than a fact-bound attack on the merits of the decision below and is not worthy of this Court's consideration. It is well established that "the correctness

or erroneousness of the decision below is not meant to be the central focus of the Court's certiorari jurisdiction." Stern, *et al., Supreme Court Practice,* § 4.17 at 222. Nor would a mere deviation in the degree of particularity of a *Harlow/Anderson* immunity determination, absent a clear misapplication or defiance of this Court's authority, present this Court with the sort of true and direct conflict warranting certiorari review.

In fact, there is no conflict between the Ninth Circuit's decision below and this Court's decision in *Anderson*. The Ninth Circuit correctly analyzed the due process and qualified immunity issues before it under the applicable authority of this Court, including *Anderson v. Creighton*, and reached a correct result.

At the outset of its decision the Ninth Circuit quoted this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. at 818, for the proposition that "[a]n official is entitled to qualified immunity when the official's conduct

'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" 924 F.2d at 1451, Appendix at 6a. The Ninth Circuit also invoked *Anderson v. Creighton* for the requirement that "the unlawfulness of the challenged conduct . . . be apparent in light of preexisting law." *Ibid.* The Ninth Circuit also cites its own earlier decision in *Schwartzman v. Valenzuela*, 846 F.2d 1209 (9th Cir. 1988), which clearly reflects its correct understanding and application of the *Anderson* standard:

> The "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3039.

846 F.2d 1209, 1211; *see also DiMartini v. Ferrin*, 889 F.2d 922, 927 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 59 U.S.L.W. 3823 (1991).

There can thus be no doubt that the Ninth Circuit understood its task under *Harlow* and *Anderson*: to determine whether the law governing the particular circumstances and issues confronting Petitioner was "clearly established." The Ninth Circuit then proceeded to do precisely that.

With respect, first, to Respondent's claim that Petitioner deprived him of a property interest without due process of law, the Ninth Circuit began by noting that the inquiry turned solely on "what process is due[,]" as Petitioner had conceded that Respondent had a protected property interest in his employment. 924 F.2d at 1451, Appendix at 7a. Relying on *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975), and *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980), the Ninth Circuit then rejected Petitioner's distinction between a temporary suspension and a discharge. 924 F.2d at 1451, Appendix 7a. Invoking the three-part balancing test established by

this Court in *Mathews v. Eldridge*, 424 U.S. 319,[1/] and citing, *inter alia*, its own decision in *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982),[2/] the Ninth Circuit then concluded that it was clearly established that post-deprivation process was not sufficient in this case. *Ibid.*

Next addressing Respondent's liberty interest claim, the Ninth Circuit relied principally on *Vanelli*, in which it had reiterated the "strong presumption" that "a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest." *Vanelli*, 667 F.2d at 778;

[1/] The three *Mathews* factors to be balanced are: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of that interest through the procedures used and (3) the fiscal and administrative burdens that any additional procedural requirements would entail. 424 U.S. at 335.

[2/] *Vanelli v. Reynolds School District No. 7* was decided January 21, 1982, well before Respondent's October 1982 suspension.

citations omitted. The Court in *Vanelli* had also stated that "a liberty interest is 'implicated if a charge impairs [one's] reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment *or the alteration of some right or status recognized by state law.*'" 924 F.2d at 1452, Appendix at 8a, quoting *Vanelli*, 667 F.2d at 777-778; emphasis in original. Thus, contrary to Petitioner's repeated contention that the law was "clearly established" *only* as to termination, the Ninth Circuit had established that other alterations in a person's employment status, such as a suspension, implicated a liberty interest protected under the Due Process clause and could require pre-deprivation due process.

The Ninth Circuit's disposition of Petitioner's immunity claims is fully consistent with this Court's

decisions in *Harlow* and *Anderson*. Contrary to Petitioner's argument, the Ninth Circuit's failure expressly to characterize Respondent's rights or its own analysis as "particularized" does not signal a departure from the law set down in *Anderson*. If not as "particularized" as Petitioner would like, the Court's inquiry properly focused on "whether the unlawfulness of the conduct challenged . . . [was] apparent in light of preexisting law." 924 F.2d at 1451, Appendix at 6a, quoting *Anderson*, 483 U.S. at 639. "The conduct challenged" is that alleged by Respondent and described by the Court in its detailed recitation of the facts. 924 F.2d at 1451, Appendix at 5a-6a.

That the Ninth Circuit correctly understood its task under *Anderson* is further established by its treatment of Petitioner's First Amendment claim. On this issue the Ninth Circuit specifically found that while it was clearly established in 1982 that public employees

could not be disciplined for exercising their First Amendment rights and that suspensions could implicate First Amendment rights, it was *not* clearly established that "*prosecutors* were protected by the first amendment from such disciplinary actions." 924 F.2d at 1453, Appendix at 9a-10a; emphasis in original. There can thus be no doubt that the Ninth Circuit fully understands the meaning of the "particularized" analysis contemplated in *Anderson*.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH THE LAW OF ANY OTHER CIRCUIT ON ANY IMPORTANT QUESTION OF FEDERAL LAW.

Because one of the fundamental purposes of certiorari jurisdiction is to ensure uniformity of decisions among the Circuits on important questions of federal law, this Court has granted certiorari review where a

conflict has arisen between or among federal courts of appeal. However, such conflict must be "direct[,] . . . square and irreconcilable" and must arise on an important question of federal law. Stern, et al., *Supreme Court Practice*, § 4.4. The Ninth Circuit's decision in this case creates no such conflict.

Petitioner devotes some five pages of his 27-page argument to the claim that the Ninth Circuit's "casual regard" for this Court's decision in *Anderson* "is at odds with the more careful application of the policies underlying *Anderson*'s particularity requirement by other Courts of Appeals." Petition at 36. However, Petitioner has not, and cannot, establish that any conflict -- much less a direct, square or irreconcilable conflict -- has arisen among the Circuits on the application of the immunity standards established by this Court in *Anderson*, nor that any other conflict has arisen on the law of qualified

immunity or on any other important question of federal law.

Petitioner's reliance on *Colaizzi v. Walker*, 812 F.2d 304 (7th Cir. 1987) and *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987) (Petition at 37-39), is entirely misplaced, as those cases both were decided *prior* to this Court's decision in *Anderson*, which Petitioner maintains added a distinct "particularity" element to the *Harlow* analysis. The Ninth Circuit's decision below plainly cannot conflict with the Seventh or the First Circuit on their application of a decision not yet rendered by this Court.

Moreover, there is no conflict between the Ninth Circuit's decision below and either the Seventh or First Circuit decisions. In *Mendez-Palou* the First Circuit analyzed the immunity defense to a First Amendment claim by reference to the "particular position" of the discharged employee. 813 F.2d at 1259. Similarly here,

in analyzing Petitioner's immunity defense to Respondent's First Amendment claim the Ninth Circuit focused on Respondent's "particular position," concluding that "it was not clearly established in 1982 that *prosecutors* were protected by the First Amendment from such disciplinary action." 924 F2d at 1453; emphasis in original.

Colaizzi is fundamentally distinguishable on different grounds. Notably, the Second Circuit found that no property or liberty interests were implicated, and treated the employee's claim as a "federal tort" claim for defamation. 812 F.2d at 307. The Court then focused exclusively on its own limited precedent. *Id.* at 308-310.

Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989), *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989) and *Barts v. Joyner*, 865 F.2d 1187 (11th Cir.) *cert. denied*, ___ U.S. ___, 110 S.Ct. 101 (1989), also cited by Petitioner, are equally unavailing. None of these decisions differs from the Ninth Circuit's approach in this case in its legal

analysis of the immunity claim before it. The *Powell* and *Price* decisions reiterate the "reasonable official" standard and cite *Anderson*. *Powell*, 865 F.2d at 1457; *Price*, 874 F.2d at 260. Moreover, in *Price* the terminated employee had been given some measure of *pre*-deprivation due process, where Respondent in this case was not. 874 F.2d at 260.

Barts is so fundamentally distinguishable on its facts -- the plaintiff had challenged her involuntary detention and transportation to the sheriff's station on Fourth Amendment grounds -- that its relevance is questionable. Moreover, the Court in *Barts* concluded that the plaintiff had failed to identify the rights allegedly infringed with sufficient particularity. Here Respondent has clearly defined and specifically articulated his employment-based property and liberty interests. Indeed, Petitioner has conceded that Respondent had a

property interest under California law. 924 F.2d at 1451, Appendix at 7a.

Nor is the Ninth's Circuit's decision in conflict with the Second Circuit's decision in *Dobosz v. Walsh*, 892 F.2d 1135 (2nd Cir. 1989), also discussed and relied upon by Petitioner. Petition at 39. In *Dobosz* the Second Circuit applied *Harlow* and *Anderson* to determine whether a police superintendent enjoyed qualified immunity in an action brought by a police officer who had been suspended for admitting, under oath, that he had violated a departmental rule. The Court announced the applicable immunity standard as follows:

> Government officials performing discretionary functions are generally protected from civil liability where the challenged conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The existence of such qualified immunity turns on the objective legal reasonableness of those actions under the

> legal rules prevailing at the time the actions were taken. *See Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

Dobosz, 892 F.2d at 1140. Applying this objective, "reasonableness" standard, the Second Circuit then determined that the superintendent was entitled to qualified immunity on the police officer's due process claim, because the police officer had admitted, under oath, to violating a departmental rule, but that the official was not entitled to immunity on the officer's First Amendment claim. The Second Circuit thus expressly applied the same "reasonable person" standard that the Ninth Circuit applied in this case. *Compare, Dobosz*, 892 F.2d at 1140, *with Finkelstein*, 924 F.2d at 1451, Appendix at 6a.

Dobosz makes no mention of any requirement that the immunity analysis be "particularized" and does not use the term. At most the Second Circuit's decision

is simply longer, in part because of the Court's discussion of a related case involving the same parties. 892 F.2d at 1141. If anything, the Court in *Dobosz* took pains to *avoid* becoming embroiled in the specific underlying factual circumstances of the case before it:

> This is a close issue because it is anything but clear whether Dobosz's testimony was a misstatement made under pressure or, if not, exactly what he is supposed to have lied about. Nevertheless, *the objective test obliges us to put aside the circumstances suggesting Walsh's bias against Dobosz and to view the latter's naked testimony.* After doing so, we must conclude that a pre-suspension hearing was unnecessary where the offending officer admits a violation of departmental rules under oath.

Ibid.; emphasis supplied.

Thus, even if the degree of "particularity" of the immunity analysis could give rise to an inter-Circuit conflict, which Respondent denies, no such conflict exists between the Ninth Circuit's decision here and the Second Circuit's decision in *Dobosz*. Moreover, as

discussed below, the difference, if any, in the degree of "particularity" of the immunity inquiry does not present a question of federal law of sufficient importance to warrant this Court's review.

III. THE PETITION SHOULD BE DENIED BECAUSE IT PRESENTS NO IMPORTANT, RECURRING OR UNRESOLVED QUESTION OF FEDERAL LAW MERITING THIS COURT'S REVIEW

As established above, Petitioner's claim amounts to no more than a fact-bound attack on the merits of the Ninth's Circuit's determination that he is not entitled to a defense of qualified immunity on Respondent's due process property and liberty claims. At issue before the Ninth Circuit was the narrow question whether it should have been reasonably apparent to Petitioner, the county's District Attorney, in October 1982, that Respondent, a Deputy District Attorney, was entitled to notice and an opportunity to be heard before being suspended and having his suspension and the alleged but unproven

grounds for the suspension disclosed to the press. Further, the Ninth Circuit's decision arises in the particular historical and political context of the local 1982 election and campaign. The Ninth Circuit's conclusion, based on its *Harlow/Anderson* analysis, that it was clearly established in 1982 that Respondent was entitled to notice and a hearing thus does not present an important issue of federal law that is likely to recur or that otherwise merits this Court's review.

The standard for qualified immunity was set forth by this court in *Anderson v. Creighton*. The degree of "particularity" that is required of a court analyzing a public official's qualified immunity defense simply is not an unresolved important question of federal law. Because the Ninth Circuit's decision is fully consistent with *Anderson* and conflicts with no other Circuit Court's holding or analysis, there is no basis to revisit a settled legal standard.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 12, 1991

Respectfully submitted,

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